
TITLE 328 UNDERGROUND STORAGE TANK FINANCIAL ASSURANCE BOARD

Proposed Rule
LSA Document #15-231**DIGEST**

Adds [328 IAC 1-1-3.2](#) and [328 IAC 1-6-3](#); and amends [328 IAC 1-1-1](#), [328 IAC 1-1-2](#), [328 IAC 1-1-3](#), [328 IAC 1-1-3.1](#), [328 IAC 1-1-4](#), [328 IAC 1-1-5.1](#), [328 IAC 1-1-8.3](#), [328 IAC 1-1-8.5](#), [328 IAC 1-1-12](#), [328 IAC 1-2-1](#), [328 IAC 1-2-2](#), [328 IAC 1-3-1](#), [328 IAC 1-3-1.3](#), [328 IAC 1-3-1.6](#), [328 IAC 1-3-3](#), [328 IAC 1-3-5](#), [328 IAC 1-4-1](#), [328 IAC 1-4-3](#), [328 IAC 1-4-4](#), [328 IAC 1-4-5](#), [328 IAC 1-5-1](#), [328 IAC 1-5-2](#), [328 IAC 1-6-1](#), [328 IAC 1-6-2](#), and [328 IAC 1-7-2](#) concerning the Excess Liability Trust Fund. Repeals [328 IAC 1-1-2.2](#), [328 IAC 1-1-6](#), [328 IAC 1-1-6.5](#), [328 IAC 1-1-9](#), [328 IAC 1-1-10](#), [328 IAC 1-3-2](#), [328 IAC 1-3-4](#), [328 IAC 1-5-3](#), and [328 IAC 1-7-1](#). Effective 30 days after filing with the Publisher.

HISTORY

First Notice of Comment Period: July 29, 2015, Indiana Register (DIN: [20150729-IR-328150231FNA](#)).

Second Notice of Comment Period: March 8, 2017, Indiana Register (DIN: [20170308-IR-328150231SNA](#)).

Notice of First Hearing: March 8, 2017, Indiana Register (DIN: [20170308-IR-328150231PHA](#)).

Change in Notice of Public Hearing: June 28, 2017, Indiana Register (DIN: [20170628-IR-328150231CHA](#)).

Date of First Hearing: August 10, 2017.

PUBLIC COMMENTS UNDER [IC 13-14-9-4.5](#)

[IC 13-14-9-4.5](#) states that a board may not adopt a rule under [IC 13-14-9](#) that is substantively different from the draft rule published under [IC 13-14-9-4](#), until the board has conducted a third comment period that is at least 21 days long.

REQUEST FOR PUBLIC COMMENTS

This proposed (preliminarily adopted) rule is substantively different from the draft rule published on March 8, 2017, at DIN: [20170308-IR-328150231SNA](#). The Indiana Department of Environmental Management (IDEM) is requesting comment on the entire proposed (preliminarily adopted) rule.

The proposed rule contains numerous changes from the draft rule that make the proposed rule so substantively different from the draft rule that public comment on the entire proposed rule is advisable. This notice requests the submission of comments on the entire proposed rule, including suggestions for specific amendments. These comments and the department's responses thereto will be presented to the board for its consideration at final adoption under [IC 13-14-9-6](#). Comments may be submitted in one of the following ways:

- (1) By mail or common carrier to the following address:

LSA Document #15-231 Excess Liability Trust Fund
Dan Watts
Rules Development Branch
Office of Legal Counsel
Indiana Department of Environmental Management
Indiana Government Center North
100 North Senate Avenue
Indianapolis, IN 46204-2251

- (2) By facsimile to (317) 233-5970. Please confirm the timely receipt of your faxed comments by calling the Rules Development Branch at (317) 233-8903.

- (3) By electronic mail to dwatts1@idem.in.gov. To confirm timely delivery of submitted comments, please request a document receipt when sending the electronic mail. **PLEASE NOTE: Electronic mail comments will NOT be considered part of the official written comment period unless they are sent to the address indicated in this notice.**

- (4) Hand delivered to the receptionist on duty at the thirteenth floor reception desk, Office of Legal Counsel, Indiana Government Center North, 100 North Senate Avenue, Indianapolis, Indiana.

Regardless of the delivery method used, to properly identify each comment with the rulemaking action it is intended to address, each comment document must clearly specify the LSA document number of the rulemaking.

COMMENT PERIOD DEADLINE

All comments must be postmarked, faxed, or time stamped not later than January 17, 2018. Hand-delivered comments must be delivered to the appropriate office by 4:45 p.m. on the above-listed deadline date.

Additional information regarding this action may be obtained from Dan Watts, Rules Development Branch, Office of Legal Counsel, (317) 234-5345 or (800) 451-6027 (in Indiana).

SUMMARY/RESPONSE TO COMMENTS FROM THE SECOND COMMENT PERIOD

IDEM requested public comment from March 8, 2017, through April 7, 2017, on IDEM's draft rule language. IDEM received comments from the following parties:

Jeremy S. Kinman, Wilcox Environmental Engineering (JK)

Richard D. Olson, Earth Exploration, Inc. (RO)

Following is a summary of the comments received and IDEM's responses thereto:

Comment: Amend [328 IAC 1-1-5.1\(1\)](#) to read "Petroleum or petroleum constituents are detected in indoor air in a building **at concentrations exceeding** the appropriate screening levels. . ." (JK)

Response: IDEM agrees with this suggestion and has made the appropriate change at [328 IAC 1-1-5.1\(1\)](#) in the draft rule proposed for preliminary adoption.

Comment: Amend [328 IAC 1-1-5.1\(3\)](#) to read "Petroleum or petroleum constituents are detected as free product, sheen, **or at concentrations exceeding the appropriate screening levels for ground water or surface water** in utility conduits or surface water." (JK)

Response: IDEM does not agree with this suggestion because not every concentration of petroleum or petroleum constituents that exceeds the appropriate screening level for ground water or surface water would warrant emergency measures, due to the nature of contamination that occurs in ground water.

Comment: At [328 IAC 1-3-1](#), fund access is limited to "eligible" parties, but this term is not explicitly defined. (JK)

Response: The term "eligible party" is defined in Indiana Code at [IC 13-11-2-62.5](#), along with other statutorily defined terms in [IC 13-11-2](#) that apply to [328 IAC 1](#).

Comment: Amend [328 IAC 1-3-1.3\(a\)\(2\)\(B\)](#) to read "the **CAP approval letter from IDEM.**" (JK)

Response: IDEM agrees with this suggestion and has made the appropriate change at [328 IAC 1-3-1.3\(a\)\(2\)\(B\)](#) in the draft rule proposed for preliminary adoption.

Comment: Amend [328 IAC 1-3-1.3\(b\)\(5\)](#) to read "The **remediation** objectives as set forth in the approved CAP are sufficient, but no more stringent than necessary, for the current **and projected future** land use for the site." (JK)

Response: IDEM agrees with the suggestion for the change from "cleanup" to "remediation" and has made the appropriate change at [328 IAC 1-3-1.3\(b\)\(5\)](#) in the draft rule proposed for preliminary adoption.

IDEM does not agree with the suggested addition of the phrase "and projected future land use" because of potential uncertainty and speculation associated with the projected future land use. Remediation objectives that are based on an uncertain projected future land use, rather than the current land use and site conditions, could result in higher-than-necessary cost reimbursement due to more extensive remediation to meet more conservative screening levels. In addition, this type of suggested change is outside the intended scope of this rulemaking, as IDEM plans to address changes to reimbursable costs and activities in a second rulemaking rather than this rulemaking.

Comment: Amend [328 IAC 1-3-5\(a\)](#) to read "The administrator **shall** pay ELTF claims for costs described under [IC 13-23-9-1.5](#)." (JK)

Response: IDEM does not agree with this suggestion because IDEM prefers to maintain consistency with the statutory language at [IC 13-23-9-1.5](#).

Comment: Amend [328 IAC 1-3-5\(b\)\(1\)](#) to add:

"... **(E) Conceptual site model development, evaluation, and analysis.**" (JK)

Response: These activities are currently reimbursed under the category of report writing, at [328 IAC 1-3-5\(b\)\(1\)\(C\)](#). IDEM will be conducting a second rulemaking to update reimbursement tasks once this rulemaking is completed and this comment is appropriately directed to the subsequent rulemaking.

Comment: Amend [328 IAC 1-3-5\(b\)\(3\)](#) to read "Soil, water, **and vapor** sampling for petroleum. . ." (JK)

Response: IDEM agrees with this suggestion and has made the appropriate change at [328 IAC 1-3-5\(b\)\(3\)](#) in the draft rule proposed for preliminary adoption.

Comment: Amend [328 IAC 1-3-5\(b\)\(6\)](#) to read "Governmental administrative fees for local, state, or federal permits necessary for corrective action **and/or site characterization activities.**" (JK)

Response: IDEM agrees with this suggested clarification and has made the appropriate change at [328 IAC 1-3-5\(b\)\(6\)](#) in the draft rule proposed for preliminary adoption.

Comment: Amend [328 IAC 1-3-5\(b\)\(9\)](#) to read "Costs associated with transitioning management of a site from previous **regulatory guidance** to current **regulatory guidance** as determined by the department, if these costs would be less than the costs to complete the remediation under the previous **regulatory guidance.**" (JK)

Response: IDEM does not agree that these amendments provide a clarification of the rule language or are consistent with the changes intended for this rulemaking and has maintained the current proposed rule language.

Comment: Amend [328 IAC 1-3-5\(d\)\(5\)](#) to read "Costs that exceed reimbursable costs even if incurred pursuant to an approved CAP, **unless the cost is the lowest amount obtained by utilizing the three bid process.**" (JK)

Response: This proposed language is beyond the scope of this rulemaking because IDEM amended the

rulemaking to focus on clarifications of existing language or new language required as a result of the recent statutory changes, rather than addressing specific reimbursable costs and activities. IDEM will address this comment and other aspects of reimbursable costs and reimbursement rates in a second rulemaking.

Comment: Amend [328 IAC 1-3-5\(d\)\(7\)](#) to read "The cost of cosmetic improvements, including the repair or replacement of blacktop or concrete, unless directly associated with corrective action, **or emergency response activities.**" (JK)

Response: IDEM agrees with this comment because cosmetic improvements, repair, or replacement might be necessary due to emergency response activities. IDEM has made the appropriate change at [328 IAC 1-3-5\(d\)\(7\)](#) in the draft rule proposed for preliminary adoption.

Comment: At [328 IAC 1-3-5\(d\)\(13\)](#), it is not clear if this change will affect how ELTF pays for costs associated with investigation and remediation of residential properties. This presents a risk that the owner/operator will be required to pay for the difference. (JK)

Response: IDEM will review all proposed investigation corrective action proposals in accordance with the corrective action requirements in [329 IAC 9](#) to ensure that proposed remediation objectives for the corrective action are appropriately protective of human health and the environment and are conducted in accordance with Indiana statute at [IC 13-12-3-2](#). An underground storage tank (UST) owner or operator that proposes to remediate beyond what is necessary to achieve a no further action determination from IDEM may have some costs that may not be reimbursable costs by ELTF.

Comment: At [328 IAC 1-3-5\(d\)\(16\)](#), the remediation costs associated with a release occurring as a result of UST system product lines damaged during investigation/remediation activities should be considered eligible for ELTF reimbursement. (JK)

Response: This comment is beyond the scope of the rulemaking because the rule language at [328 IAC 1-3-5\(d\)\(16\)](#) in the draft rule is a clarification of existing rule language that was previously located at [328 IAC 1-3-1\(g\)](#), which concerns fund access. IDEM determined that this language is more appropriately descriptive of costs not covered by the fund and should be located in [328 IAC 1-3-5\(d\)](#), which is the portion of the ELTF rule that addresses costs not covered by ELTF. The proposal by the commenter above is recommending a reimbursement from ELTF for costs not currently reimbursed by the fund which is beyond the scope of this rulemaking. IDEM will be initiating a second rulemaking to consider reimbursement of other aspects of corrective action.

Comment: Amend [328 IAC 1-3-5\(e\)](#) under SITE CHARACTERIZATION to read "Rock drilling beyond auger refusal **is** reimbursed at the above rates. . ." (JK)

Response: IDEM thanks the commenter for noticing this error and has made the appropriate change at [328 IAC 1-3-5\(e\)](#) in the draft rule proposed for preliminary adoption.

Comment: Amend [328 IAC 1-3-5\(f\)\(2\)](#) to read:

"...(D) Hydrogeologic and contaminant modeling **including preparing, updating, and evaluating the conceptual site model.**

(E) . . .

(F) **Site evaluation using RISC, RCG, or other guidance documents.**" (JK)

Response: The commenter's proposed language for [328 IAC 1-3-5\(f\)\(2\)\(D\)](#) are activities associated with the conceptual site model that IDEM already considers for reimbursement under the existing task description "Hydrogeologic and contaminant modeling".

The commenter's suggestion for new rule language at [328 IAC 1-3-5\(f\)\(2\)\(F\)](#) is beyond the scope of this rulemaking because IDEM intended to clarify the meaning of the RISC acronym rather expand the item to include additional activities. IDEM will be initiating a second rulemaking once this rule is finalized to review reimbursable costs and tasks and associated fund coverage.

Comment: Amend [328 IAC 1-3-5\(f\)\(3\)](#) to read:

". . .(A) Technical document preparation (CAP, ISC, FSI, pilot study, **quarterly monitoring report, etc.**).

[General comment: remove remediation work plan reference as this document is more applicable to other programs.]

(B) . . .

(C) . . .

(D) . . .

(E) Statistics and equations. [General comment: remove RISC reference, and refrain from adding additional references to guidance]. . ." (JK)

Response: IDEM agrees with the suggestion at [328 IAC 1-3-5\(f\)\(3\)\(A\)](#) and has deleted the reference to "remediation work plan" and made the appropriate changes in the draft rule proposed for preliminary adoption.

IDEM has clarified the language at [328 IAC 1-3-5\(f\)\(3\)\(E\)](#) in the draft rule proposal for preliminary adoption to include other guidance documents required by IDEM for corrective action.

Comment: Amend [328 IAC 1-3-5\(f\)\(4\)](#) to read:

". . .(E) Oversee **IDNR water well database** searches.

(F) **Evaluate utility locations . . .**" (JK)

Response: IDEM does not agree that the suggested specificity is necessary for well water searches and has

maintained the existing rule language at [328 IAC 1-3-5\(f\)\(4\)\(E\)](#).

IDEM agrees that the rule language at [328 IAC 1-3-5\(f\)\(4\)\(F\)](#) needs additional clarification and has amended the task description in the draft rule proposed for preliminary adoption.

Comment: Further consideration should be given to the financial implications of the technical milestone requirement for claim submittals. (JK)

Response: This rulemaking specifically addresses the technical milestone requirement for claim submittals at [328 IAC 1-3-5\(a\)](#) by removing that requirement. IDEM is unsure as to what other provisions concerning technical milestones and claim submittal the commenter is referencing or requesting IDEM to consider.

Comment: Wilcox looks forward to offering comments pertaining to an evaluation of labor, laboratory, equipment, and expense rates in the near future. (JK)

Response: IDEM thanks the commenter for the interest in the subject and also looks forward to addressing these aspects of ELTF reimbursement in a future rulemaking.

Comment: Additional evaluation is needed regarding streamlining the claim preparation and submittal process. The agency should consider transitioning to an electronic claim submittal process. Costs associated with claim preparation and submittal should also be considered eligible for ELTF reimbursement. (JK)

Response: Amending rule requirements through the rulemaking process is not necessary to transition to an electronic claim submittal process, but IDEM will consider the comment as it continues to implement changes to improve the administration of the ELTF program.

Legislation enacted during the 2017 session of the Indiana General Assembly addresses cost reimbursement for claim preparation and submittal. Public Law 200-2017 added [IC 13-23-9-1.5\(a\)\(2\)\(G\)](#) to allow the administrator to pay ELTF claims for costs that result from "Compensation paid by the claimant to technicians for services performed in preparation of the claimant's ELTF claim." IDEM has made accompanying changes to the rule requirements at [328 IAC 1-3-5\(b\)\(13\)](#) and [328 IAC 1-3-5\(d\)\(10\)](#) that implement the statutory changes.

Comment: The agency should consider multiple versions of claim forms available for download. The current form is a Microsoft Excel 97-2003 worksheet, and many features of current versions of Excel are not available for use with the outdated worksheet format. (JK)

Response: Amending rule requirements through the rulemaking process is not necessary to offer different and updated versions of claim forms, but IDEM will consider the comment as it continues to implement changes to improve the administration of the ELTF program.

Comment: Timeliness of payment. We are always a subcontractor (environmental drilling) on these types of projects. Sometimes it takes us up to two years to get paid. We understand from the consultants that it is often due to a milestone that needs to be met before they can invoice for our services. This delay in payment is simply unacceptable and we have thought several times about not doing any more ELTF work. I also know other subcontract drilling companies that don't do ELTF work because of that. I must admit that I don't fully understand the amended language in the rule. It appears to help the situation, but I am not sure. (RO)

Response: Amending rule requirements most likely will not effectively address this issue because the delay in payment is more related to private party relationships than ELTF rule requirements. If a subcontractor is anticipating payment from a consultant or eligible party for services performed for a project, the rule requirements do not establish deadlines for when that payment must occur. The rule requirements and ELTF administration do not determine the business relationship between the eligible parties, consultants, and subcontractors.

Timelines for payment of reimbursable costs and ELTF indemnity claims are in the statutory requirements at [IC 13-23-9](#), which include deadlines for the auditor of the state to pay approved ELTF claims and ELTF indemnity claims, the attorney general to approve or deny ELTF indemnity claims, and the commissioner to approve or deny a corrective action plan. However, the rule requirements do not include timelines for IDEM to review, approve, or deny all types of ELTF claims and reimbursable costs. IDEM does seek to improve the efficiency of the ELTF claims review process through nonrule changes to department processes, policies, and structure without necessitating amendments to the rule requirements. These types of departmental improvements can expedite the processing and approval of ELTF claims, without initiating the rulemaking process.

The proposed rule requirements at [328 IAC 1-3-3\(a\)](#) do establish deadlines for the submittal of claims for payment of reimbursable costs and ELTF indemnity claims. The deadlines are dependent upon the submittal of reports for activities related to corrective action. IDEM believes that these deadlines are of sufficient length for eligible parties to submit claims while also preventing long delays in payments for claims. However, these deadlines do not determine the timeliness of payment to any subcontractors for work performed.

Comment: Prices for blank drilling of wells is still way too low. The pricing for installing wells with sampling is adequate. Therefore, the difference adds up to much more than just the cost of the sampling. (RO)

Comment: To only have one mobilization for a project across the street or in Evansville isn't cost effective either. It should be based on distance from the office. (RO)

Comment: I'm not sure why there is an escalation rate in the fee structure for consultants, but not for drilling. Our costs go up every year, probably even more than theirs do. I would like to see an escalation rate for drilling as well. (RO)

Response: As stated in the Second Notice of Comment Period, IDEM has modified the focus of this particular

rulemaking to amend the existing rules to comport with the legislative changes included in Public Law 96-2016. Comporting the rules with the legislative changes is not related to specific reimbursement rates found within the existing rules. IDEM intends to begin another rulemaking to address the issues with reimbursement rates and other aspects of evaluating and reimbursing ELTF claims. These comments will need additional feedback and consideration before changing the reimbursement rate and the types of activities eligible for reimbursement. The suggestions provided in this comment will be reviewed during the subsequent rulemaking process, as will all comments related to amending the current reimbursement rates and activities eligible for reimbursement.

SUMMARY/RESPONSE TO COMMENTS RECEIVED AT THE FIRST PUBLIC HEARING

On August 10, 2017, the Underground Storage Tank Financial Assurance Board (board) conducted the first public hearing/board meeting concerning the development of amendments to [328 IAC 1](#). Comments were made by the following parties:

Chris Braun, Indiana Petroleum Marketers and Convenience Store Association (CB)

Karla McDonald, Golars Environmental and Remediation Services (KM)

Om Narla, Golars Environmental and Remediation Services (ON)

Following is a summary of the comments received and IDEM's responses thereto:

Comment: While Golars agrees that these new amendments include many fiscal changes that will benefit eligible parties in terms of fund access and available dollar amounts, we do not completely agree with IDEM's statement of "The rule amendments that become effective with this rulemaking will not have an additional fiscal impact beyond the fiscal impact from the legislative changes".

Due to changes in technical policy and procedures undertaken by IDEM as part of these amendments, financial impacts to eligible parties relating to future property use and off-site property owners are of concern and not addressed by IDEM. (KM)

Comment: We do believe that there are some fiscal impacts to owners and operators and even off-site property owners, in regards to some of the definitions that are provided in the new rule. That really relates to future property use and financing available to a new property owner or even an existing property owner. (KM)

Response: Rather than attempt to address the general nature of the subject matter in this comment, IDEM will examine and respond to the subsequent, more specific comments that elaborate upon the general subject matter. In addition, this comment focuses on IDEM's technical policy and procedures for ELTF, a subject which IDEM does not address in this rulemaking. The purpose of this rulemaking is to address cost reimbursement procedures for ELTF and implement the recent statutory changes.

Comment: The new proposed definition for "cost effectiveness" at [328 IAC 1-1-3.2](#) allows for IDEM to measure corrective action based on a "reasonableness and cost effectiveness" standard ([328 IAC 1-3-1\(c\)\(2\)](#)). Under the Administrative Rules and Procedures Act codified at [IC 4-22-2-19.5](#), a rule adopted by an agency should be written for "ease of comprehension" and fails if it is too "vague, arbitrary or capricious" upon judicial review.

The cost effectiveness definition at [328 IAC 1-1-3.2](#) is too vague and is very subjective. The proposed definition does not identify the entity that "approves" the CAP and site characterization. The proposed definition considers "cost relative to outcome" – this terminology is subjective and could allow for misinterpretation.

The proposed definition considers "reliability of the remediation alternative", reliability as determined by whom? The environmental consultant? IDEM? This terminology also is subjective as written. This proposed definition potentially allows IDEM to become the entity which determines/develops the corrective action approach instead of the eligible party's environmental consultant.

The definitional changes that seek to address the "cost effectiveness" at [328 IAC 1-1-3.2](#) do not provide sufficient guidance to propose CAP and site characterization. The standard of "reasonableness and cost effectiveness" ([328 IAC 1-3-1\(c\)\(2\)](#)) compounds the vague, subjective nature of the definition that will likely lead to a lack of clarity rather than one that is easily comprehended. We would respectfully request more clarity in the definition either by adding language with more specificity or in addressing the specific comments with greater guidance.

Under previous IDEM guidance, it was understood that IDEM would approve a certain level of remediation costs, i.e. industrial closure levels. The new proposed definition seems to allow IDEM to deny potential remediation costs/CAP for a "cost effective approach" that may impact the responsible party's ability regarding future property use. This process is ultimately limiting corrective action at the time when resources are available and based on a subjective "cost effective/reliable" determination from IDEM. (KM)

Comment: We do feel that the "cost effectiveness" definition in the rule is somewhat vague, and we would like to point out that, in accordance to the Administrative Rules and Procedure Act, rules should be written for ease of comprehensive, and we don't feel necessarily that the ease of comprehension is there with the "cost effectiveness" definition. The discussion of that definition is that technical reviews will be done on the capability of the corrective action program to achieve remediation in regards to a cost-relative outcome, and that's all well and good and we wholeheartedly agree to that.

However, we pose the question of who truly can make that decision? Is it a site's consultant who works with

the owner and their idea of where they want to be with that property next year, three years, five years from now? Or is that IDEM that makes the decision that this is the most cost-effective approach, with no necessarily thought of a year or three years from now what that property use may be, or the ability for the property owner to get financing for that property for any future use?

We just really would like that definition to be looked at and maybe clarified a little bit, because it could be where on the owner's and operator's side, that cost and availability to achieve remediation may be one answer and it's in a different thought with the agency. (KM)

Response: IDEM agrees with the reasoning stated by the commenter and will delete the "cost effectiveness" definition at [328 IAC 1-1-3.2](#) in the draft rule proposed for final adoption. The proposed definition could be interpreted as vague, subjective, and confusing, although the intent was to clarify "cost effectiveness." The proposed definition at [328 IAC 1-1-3.2](#) is not necessary to clarify cost effectiveness and will be removed. The existing procedures in [328 IAC 1](#) for determining cost effectiveness, which clearly state that the administrator determines cost effectiveness, will be retained.

Comment: On May 12, 2017, IDEM denied an active remediation CAP for a site located at 1702 Allison Lane, Jeffersonville, IN. Contamination from the site has migrated off-site, including free product. IDEM stated that it believes active remediation would only have limited success and that an environmental restrictive covenant (ERC) should be used to address the off-site impacts. In addition to the legal implications at this site, the CAP denial letter stated an alternative approach without details or reasoning nor did it provide an option to contest IDEM's denial. The technical review panel option and the administrative appeal option are missing on this letter. Did IDEM change the policy? Additionally, IDEM's OLQ Technical Review Panel, which would review CAP disputes, is not available for LUST sites.

At this site, the off-site property is a commercial building and the owner has been very cooperative in providing access after some initial struggles. However, the owner will not allow us to leave the free product on-site as it will diminish the property value and could be potential liability for them.

At a different site, a third-party claim was brought against one of our clients for over \$400,000 due to off-site impacts below residential closure levels. With the free product present at the Jeffersonville site, the off-site owner can bring a large lawsuit against the responsible party and, if they win, IDEM will end up paying the bill. Golars does not believe that this is in the best interest of IDEM. In accordance to current rules, the plaintiff's attorney fees will be unlimited while the defendant's attorney fees are limited to \$30,000 or 25% of the settlement, whichever is lower. There is a large incentive for plaintiffs' lawyers to file a lawsuit. (KM)

Comment: Recently we have received a CAP denial from a site, where we had proposed a more active approach in remediation. The site has significant off-site issues. We have off-site owners who sometimes work with us, sometimes don't. Our active approach was denied, and the "cost-effectiveness and that capability to achieve receive remediation" statements were included in that denial letter. However, that was it.

The LUST group did come back and say, "We want you to do Plan B instead," with very little information on what Plan B really was, and said "have your response with us in 30 days." We looked at that letter and we didn't know where to go with this. For all of the information we had to provide in the CAP and our justification of why we thought the CAP was appropriate, we get a page-and-a-half letter back that says, "No, just do this, and get an environmental restrictive covenant, with the off-site owner," which will not happen in this case. Another kind of notation on that is in that letter is "If you would like—if you want to contest this denial or whatever, contact so-and-so," and that language was taken out of the letter. This is your CAP approach.

And also, IDEM does have a technical review panel available to take when a consultant and the project manager or technical team don't agree, they come in and sit down with that panel. However, to our knowledge, that tech review panel is not available for LUST sites. So, we're back to sitting down the group that already said, "No, and we want you to do this approach." (KM)

Response: Many of the issues included in this comment are site-specific technical or procedural matters that are outside the scope of this rulemaking. IDEM has never included LUST sites in the Technical Review Panel. Agency decisions may be appealed through the applicable administrative procedures outlined in [IC 4-21.5](#).

With regards to attorney's fees, the limits of \$30,000 or 25% of an ELTF indemnity claim, whichever is less, is located at [328 IAC 1-6-2\(d\)\(3\)](#). However, IDEM does not have the discretion to determine the reimbursement for a third party lawsuit that does not meet that exact requirement. Making that determination is outside the scope of this rulemaking.

Comment: A concern with IDEM's new approach on CAP approvals is that during the entire course of a denial process, IDEM does not pay for the costs incurred by the responsible party until it is resolved. This puts the eligible party at a disadvantage. (KM)

Response: IDEM is uncertain of the exact section of the rulemaking that the commenter is referencing. For reimbursement related to CAP approvals, the rulemaking proposes to remove the technical milestones as a necessary condition of reimbursement at [329 IAC 1-3-5\(a\)](#), which includes CAP approvals. The proposed rule language references the statutory requirements at [IC 13-23-9-1.5](#) for activities that are reimbursable for ELTF claims. In addition, [IC 13-23-9-2.2](#) describes the approval and denial process for CAPs, and IDEM does not have the authority to amend the statutes with a rulemaking.

Comment: At Golars, we are not comfortable recommending leaving contamination on- or off-site and closing the incident because it is the less expensive and quickest option. This approach could potentially create future issues. Although IDEM states that their decisions are based strictly on a technical basis, those decisions also affect sites financially now and particularly in the future. Below is an example:

(1) Site: 5801 National Road, Richmond, IN

(a) IDEM issues NFA on February 18, 2009 (with contamination above closure levels on-site).

(b) The owner removed the USTs at the site on November 18, 2009, ONLY after confirming that there were no new leaks by performing tank tightness tests. During UST removal, residual contamination from the closed incident was encountered. IDEM made the determination this was a new release and issued a violation letter requesting site investigation.

(c) Golars replied stating that the contamination was from previous release. IDEM did not agree and again requested a full investigation.

(d) The site owner spent over \$80,000 to conduct a new site investigation. Upon investigation report review, IDEM decided the impacts were part of the original release and deactivated the new release stating there was no new contamination.

(2) The purpose of this example is to demonstrate that the whole process is very subjective and stressful for the small business owners. During issues like this one, the properties cannot access needed financing. Golars believes that this would seem to risk adding to the Brownfield sites many communities are left to address at a future point. (KM)

Comment: We also think that, as a consultant, we are somewhat hesitant to go to a client and say, "We're just going to leave this contamination here, because, technically, I can get a case together that says it's not going to hurt anybody if we leave it here," on a human health level.

However, the owner/operator has a lot more issues than that. I go back to the financial responsibility that they have to this property and future use of that property. If the tools are not there for this property owner to use towards that property, then it could very well be the owner eventually walks away, and then who's left with it? (KM)

Response: With regards to the type of situation described by the commenter, IDEM's goal is to ensure that UST owners and operators understand their legal obligations to complete corrective action in accordance with the applicable laws and rules. IDEM understands the need for timeliness and attempts to complete its oversight, review, and approval so UST owners and operators can quickly obtain a no further action determination for an eligible release.

Comment: For the proposed rule language at [328 IAC 1-3-1\(c\)](#), there is only one eligible party per incident, but there may be more than one party granted the rights to access the fund. Again, this is subjective and vague. (KM)

Response: The proposed rule language at [328 IAC 1-3-1\(c\)](#) and (d) is intended to clarify how the administrator determines reimbursement if more than one eligible party submits a claim for duplicative acts, as the ELTF statutes do not include requirements for such a situation. IDEM recognizes that [328 IAC 1-3-1\(c\)](#) is somewhat unclear and vague, so IDEM is proposing to combine [328 IAC 1-3-1\(c\)](#) and (d) to clarify that these requirements are related. This change will be included in the draft rule proposed for final adoption.

Comment: IDEM proposed rule language at [328 IAC 1-3-1.3\(a\)](#) to read "the administrator shall determine if work to be performed or the work already performed, or a portion thereof, under an approved CAP is cost effective. . .".

IDEM is currently utilizing this policy/procedure to alter approved CAP activities and to limit remediation with both on-site and off-site properties. This approach adds to current and future fiscal impacts for eligible parties and off-site owners that does not seem to be a part of IDEM's decision process. (KM)

Response: The proposed amendment for the rule language at [328 IAC 1-3-1.3\(a\)](#) is a reorganization of existing language and is not a new requirement. The movement of the phrase to the beginning of the sentence does not modify the intent of the existing requirement. In this subsection, the rule language is being reorganized from the end of the sentence to the beginning of the sentence, as the proposed phrase is more accurate and appropriate at the beginning of the sentence and in compliance with the recommendations set forth in the Administrative Rules Drafting Manual regarding sentence structure in tabulated lists.

Comment: The draft of the rule was so well done and it adhered so closely to the legislation that was adopted in 2016 and 2017 that we had not a single comment. On behalf of the IPCA and its UST owners and operators, we fully support the preliminary adoption of the rule. (CB)

Response: IDEM appreciates the commenter's support of this rulemaking and their continued involvement as IDEM seeks to continuously improve the various aspects of the ELTF and UST programs.

Comment: This comment pertains to the management of ELTF, procedures for quarterly monitoring and well drilling, and data collection and evaluation. The commenter commends IDEM and the board for their sustainable management of ELTF, while suggesting that Indiana could continue examining similar rules and funds in other states to evaluate and compare monitoring procedures. The commenter also describes some of the challenges they encounter with well drilling, monitoring, ground water flow, and data collection and evaluation. They ask

IDEM to further examine the procedures and challenges associated with these activities under the current rule requirements. (ON)

Response: While IDEM values the feedback for these aspects of the ELTF program, IDEM is uncertain which aspects of the rulemaking that the commenter is referring to. IDEM also finds these comments to be beyond the scope of this rulemaking, as the foci of the rulemaking are amendments as a result of the recent statutory changes and clarifications of existing rule language.

[328 IAC 1-1-1](#); [328 IAC 1-1-2](#); [328 IAC 1-1-2.2](#); [328 IAC 1-1-3](#); [328 IAC 1-1-3.1](#); [328 IAC 1-1-3.2](#); [328 IAC 1-1-4](#); [328 IAC 1-1-5.1](#); [328 IAC 1-1-6](#); [328 IAC 1-1-6.5](#); [328 IAC 1-1-8.3](#); [328 IAC 1-1-8.5](#); [328 IAC 1-1-9](#); [328 IAC 1-1-10](#); [328 IAC 1-1-12](#); [328 IAC 1-2-1](#); [328 IAC 1-2-2](#); [328 IAC 1-3-1](#); [328 IAC 1-3-1.3](#); [328 IAC 1-3-1.6](#); [328 IAC 1-3-2](#); [328 IAC 1-3-3](#); [328 IAC 1-3-4](#); [328 IAC 1-3-5](#); [328 IAC 1-4-1](#); [328 IAC 1-4-3](#); [328 IAC 1-4-4](#); [328 IAC 1-4-5](#); [328 IAC 1-5-1](#); [328 IAC 1-5-2](#); [328 IAC 1-5-3](#); [328 IAC 1-6-1](#); [328 IAC 1-6-2](#); [328 IAC 1-6-3](#); [328 IAC 1-7-1](#); [328 IAC 1-7-2](#)

SECTION 1. [328 IAC 1-1-1](#) IS AMENDED TO READ AS FOLLOWS:

ARTICLE 1. EXCESS LIABILITY TRUST FUND CORRECTIVE ACTION AND ELTF LIABILITY INDEMNITY CLAIM PAYMENTS

[328 IAC 1-1-1](#) Application of definitions

Authority: [IC 13-23-11-7](#)

Affected: [IC 13-11-2](#); [IC 13-23](#)

Sec. 1. ~~The definitions in [IC 13-11-2](#) apply to this article.~~ In addition to the definitions in [IC 13-11-2](#), the definitions in this rule apply throughout this article.

(Underground Storage Tank Financial Assurance Board; [328 IAC 1-1-1](#); filed Dec 4, 1992, 11:00 a.m.: 16 IR 1051; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534; filed Oct 17, 2001, 4:30 p.m.: 25 IR 787; readopted filed May 14, 2007, 1:52 p.m.: [20070523-IR-328070137BFA](#); readopted filed Jul 29, 2013, 9:18 a.m.: [20130828-IR-328130177BFA](#))

SECTION 2. [328 IAC 1-1-2](#) IS AMENDED TO READ AS FOLLOWS:

[328 IAC 1-1-2](#) "Administrator" defined

Authority: [IC 13-23-11-7](#)

Affected: [IC 13-23](#)

Sec. 2. "Administrator" refers to the commissioner of the department of environmental management.

(Underground Storage Tank Financial Assurance Board; [328 IAC 1-1-2](#); filed Dec 4, 1992, 11:00 a.m.: 16 IR 1051; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534; filed Oct 17, 2001, 4:30 p.m.: 25 IR 787; filed Aug 30, 2004, 9:40 a.m.: 28 IR 123; readopted filed May 14, 2007, 1:52 p.m.: [20070523-IR-328070137BFA](#); readopted filed Jul 29, 2013, 9:18 a.m.: [20130828-IR-328130177BFA](#))

SECTION 3. [328 IAC 1-1-3](#) IS AMENDED TO READ AS FOLLOWS:

[328 IAC 1-1-3](#) "Corrective action" defined

Authority: [IC 13-23-11-7](#)

Affected: [IC 13-23](#)

Sec. 3. "Corrective action" means ~~any or all work performed or to be performed, including all work performed or to be performed under a CAP as defined under section 3.1 of this rule and rules of the solid waste management board at [329 IAC 9-1-14.7](#), to:~~

- ~~(1) minimize;~~
- ~~(2) contain;~~
- ~~(3) eliminate;~~
- ~~(4) remediate;~~

- (5) mitigate; or
- (6) clean up;

a release caused by an occurrence, including emergency measures taken as part of an initial response to the release under rules of the solid waste management board at [329 IAC 9-5-2](#). **has the meaning set forth at [329 IAC 9-1-14.5](#).**

(Underground Storage Tank Financial Assurance Board; [328 IAC 1-1-3](#); filed Dec 4, 1992, 11:00 a.m.: 16 IR 1051; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534; filed Oct 17, 2001, 4:30 p.m.: 25 IR 787; filed Aug 30, 2004, 9:40 a.m.: 28 IR 123; readopted filed May 14, 2007, 1:52 p.m.: [20070523-IR-328070137BFA](#); readopted filed Jul 29, 2013, 9:18 a.m.: [20130828-IR-328130177BFA](#))

SECTION 4. [328 IAC 1-1-3.1](#) IS AMENDED TO READ AS FOLLOWS:

[328 IAC 1-1-3.1](#) "Corrective action plan" or "CAP" defined

Authority: [IC 13-23-11-7](#)

Affected: [IC 13-23-7](#); [IC 13-23-9-2.2](#)

Sec. 3.1. "Corrective action plan" or "CAP" means ~~the corrective action plan described by rules of the solid waste management board at [329 IAC 9-5-7](#)(a) and [329 IAC 9-5-7](#)(b).~~ **has the meaning set forth at [329 IAC 9-1-14.7](#).**

(Underground Storage Tank Financial Assurance Board; [328 IAC 1-1-3.1](#); filed Oct 17, 2001, 4:30 p.m.: 25 IR 788; readopted filed May 14, 2007, 1:52 p.m.: [20070523-IR-328070137BFA](#); readopted filed Jul 29, 2013, 9:18 a.m.: [20130828-IR-328130177BFA](#))

SECTION 5. [328 IAC 1-1-3.2](#) IS ADDED TO READ AS FOLLOWS:

[328 IAC 1-1-3.2](#) "Cost effectiveness" defined

Authority: [IC 13-23-11-7](#)

Affected: [IC 13-23-7](#); [IC 13-23-9-1.5](#)

Sec. 3.2. "Cost effectiveness" means the evaluation of a remediation alternative based on the capability to achieve the remediation objectives determined under an approved CAP and site characterization, considering the:

- (1) cost relative to outcome;
- (2) reliability of the remediation alternative; and
- (3) impact on the viability of the fund.

(Underground Storage Tank Financial Assurance Board; [328 IAC 1-1-3.2](#))

SECTION 6. [328 IAC 1-1-4](#) IS AMENDED TO READ AS FOLLOWS:

[328 IAC 1-1-4](#) "Deductible amount" defined

Authority: [IC 13-23](#)

Affected: [IC 13-23-9-1.3](#)

Sec. 4. "Deductible amount" means the amount specified in ~~[IC 13-23-8-3](#) [IC 13-23-9-1.3](#)~~ applicable to each incident number assigned by the department. ~~A person applying to the fund under [328 IAC 1-3-1](#) must provide evidence of payment of reimbursable costs incurred equal to the deductible amount prior to receiving any reimbursement from the ELTF.~~

(Underground Storage Tank Financial Assurance Board; [328 IAC 1-1-4](#); filed Dec 4, 1992, 11:00 a.m.: 16 IR 1051; filed Jan 9, 1997, 4:00 p.m.: 20 IR 1103; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534; filed Oct 17, 2001, 4:30 p.m.: 25 IR 788; filed Aug 30, 2004, 9:40 a.m.: 28 IR 124; readopted filed May 14, 2007, 1:52 p.m.: [20070523-IR-328070137BFA](#); filed Feb 24, 2011, 2:04 p.m.: [20110323-IR-328080684FRA](#); readopted filed Jun 29, 2017, 9:30 a.m.: [20170726-IR-328170227BFA](#))

SECTION 7. [328 IAC 1-1-5.1](#) IS AMENDED TO READ AS FOLLOWS:

[328 IAC 1-1-5.1](#) "Emergency measures" defined

Authority: [IC 13-23-11-7](#)

Affected: [IC 13-12-3-2](#); [IC 13-23-9-1.5](#)

Sec. 5.1. "Emergency measures" means any work described under ~~[IC 13-23-8-4\(b\)\(1\)](#)~~; [IC 13-23-9-1.5\(a\)\(2\)\(C\)](#). The term only includes the necessary work performed to directly abate the following conditions related to a release:

- (1) Petroleum or petroleum constituents are detected in indoor air in ~~an inhabitable~~ a building ~~greater than short term risk-based concentrations~~ **at concentrations exceeding the appropriate screening levels as specified by the department in accordance with the remediation standards determined** under [IC 13-12-3-2](#) for the contaminants of concern.
- (2) Petroleum or petroleum constituents, greater than ten percent (10%) of the measured lower explosive limits, are detected anywhere in utility conduits, such as sewers.
- (3) Petroleum or petroleum constituents are detected as free product or sheen in utility conduits or surface water.
- (4) Petroleum or petroleum constituents are detected as free product off-site, not including easements or rights-of-way.
- (5) Petroleum or petroleum constituents are detected at or above the ~~maximum contamination levels (MCLs) or RISC residential~~ **appropriate screening levels for ground water cleanup objectives as specified by the department in accordance with the remediation standards determined** under [IC 13-12-3-2\(a\)](#):
 - (A) in a drinking water well, as measured at the point of compliance or at the tap; or
 - (B) within one (1) year time of travel from a public drinking water well, and the petroleum or petroleum constituents are in imminent danger of impacting drinking water.
- (6) Any other condition requiring direct abatement, as specified by the commissioner, based on the potential threat to human health or the environment.

(Underground Storage Tank Financial Assurance Board; [328 IAC 1-1-5.1](#); filed Oct 17, 2001, 4:30 p.m.: 25 IR 788; filed Aug 30, 2004, 9:40 a.m.: 28 IR 124; readopted filed May 14, 2007, 1:52 p.m.: [20070523-IR-328070137BFA](#); readopted filed Jul 29, 2013, 9:18 a.m.: [20130828-IR-328130177BFA](#))

SECTION 8. [328 IAC 1-1-8.3](#) IS AMENDED TO READ AS FOLLOWS:

[328 IAC 1-1-8.3](#) "Reasonable" defined

Authority: [IC 13-23-11-7](#)

Affected: [IC 13-23](#); [IC 13-23-9-1.5](#)

Sec. 8.3. "Reasonable" means that the site characterization and corrective action are:

- (1) appropriate and performed only as necessary to meet the cleanup objectives for the site; ~~The term also means that corrective action and site characterization are and~~
- (2) consistent with the requirements of:
 - (A) [329 IAC 9](#); ~~other applicable state and federal laws and regulations; and~~
 - (B) [328 IAC 1-3-5\(b\)](#) through [328 IAC 1-3-5\(e\)](#); and
 - (C) **other applicable state and federal laws and regulations.**

(Underground Storage Tank Financial Assurance Board; [328 IAC 1-1-8.3](#); filed Aug 30, 2004, 9:40 a.m.: 28 IR 124; readopted filed May 14, 2007, 1:52 p.m.: [20070523-IR-328070137BFA](#); readopted filed Jul 29, 2013, 9:18 a.m.: [20130828-IR-328130177BFA](#))

SECTION 9. [328 IAC 1-1-8.5](#) IS AMENDED TO READ AS FOLLOWS:

[328 IAC 1-1-8.5](#) "Site characterization" defined

Authority: [IC 13-23-11-7](#)

Affected: [IC 13-23](#)

Sec. 8.5. "Site characterization" means the work performed under the initial site characterization (ISC) described in ~~rules of the solid waste management board at~~ [329 IAC 9-5-5.1](#) ~~or work performed under further site~~

investigations described in [329 IAC 9-5-6](#) and may include, as necessary, quarterly monitoring and pilot studies to determine the feasibility of remediation alternatives.

(Underground Storage Tank Financial Assurance Board; [328 IAC 1-1-8.5](#); filed Oct 17, 2001, 4:30 p.m.: 25 IR 788; filed Aug 30, 2004, 9:40 a.m.: 28 IR 125; readopted filed May 14, 2007, 1:52 p.m.: [20070523-IR-328070137BFA](#); readopted filed Jul 29, 2013, 9:18 a.m.: [20130828-IR-328130177BFA](#))

SECTION 10. [328 IAC 1-1-12](#) IS AMENDED TO READ AS FOLLOWS:

[328 IAC 1-1-12](#) "UST system" or "tank system" defined

Authority: [IC 13-23](#)

Affected: [IC 13-23](#)

Sec. 12. "UST system" or "tank system" means the following:

- (1) ~~Underground storage tank.~~
- (2) ~~Connected underground piping.~~
- (3) ~~Underground ancillary equipment, as defined in the rules of the solid waste management board at [329 IAC 9-1-5](#).~~
- (4) ~~Containment system, if any.~~

has the meaning set forth at [329 IAC 9-1-49](#).

(Underground Storage Tank Financial Assurance Board; [328 IAC 1-1-12](#); filed Feb 24, 2011, 2:04 p.m.: [20110323-IR-328080684FRA](#); readopted filed Jun 29, 2017, 9:30 a.m.: [20170726-IR-328170227BFA](#))

SECTION 11. [328 IAC 1-2-1](#) IS AMENDED TO READ AS FOLLOWS:

[328 IAC 1-2-1](#) Applicability

Authority: [IC 13-23-11-7](#)

Affected: [IC 13-23](#)

Sec. 1. ~~This article implements provisions of [IC 13-23](#) for the administration of the fund. This article establishes procedures by which Persons listed in [328 IAC 1-3-1](#) may apply to the fund for payment of reimbursable costs and third-party liability ELTF indemnity claims. Payment of reimbursable costs and third-party liability claims shall be made in accordance with the following:~~

- (1) ~~[328 IAC 1-3-4](#) (b) applies to any one (1) site upon which the corrective action has not been completed as of November 16, 2001. Eligibility requirements, deductible amounts, maximum reimbursement per eligible release, and maximum reimbursement per eligible party are determined by the requirements and limits in effect on:~~

~~(A) the date the release occurs; or~~

~~(B) if the date that the release occurs cannot be determined, the date the release was discovered.~~

- (2) ~~The applicable cost range or amount of the reimbursable cost, as set forth in [328 IAC 1-3-5](#), shall be is determined under the section in effect on the date of the invoice for the work and the costs so incurred. unless If the work is performed by the owner, operator, or applicant, in which case, it is the applicable cost range or amount of the reimbursable cost is determined by the date the work was completed.~~

(Underground Storage Tank Financial Assurance Board; [328 IAC 1-2-1](#); filed Dec 4, 1992, 11:00 a.m.: 16 IR 1052; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534; filed Oct 17, 2001, 4:30 p.m.: 25 IR 789; filed Aug 30, 2004, 9:40 a.m.: 28 IR 125; readopted filed May 14, 2007, 1:52 p.m.: [20070523-IR-328070137BFA](#); readopted filed Jul 29, 2013, 9:18 a.m.: [20130828-IR-328130177BFA](#))

SECTION 12. [328 IAC 1-2-2](#) IS AMENDED TO READ AS FOLLOWS:

[328 IAC 1-2-2](#) Fund management

Authority: [IC 13-23-11-7](#)

Affected: [IC 13-23](#)

Sec. 2. The administrator of the fund shall prepare an annual report to the financial assurance board by September 1 of each year. The report shall **must** include the following:

- (1) A financial statement detailing information for the management and oversight of the fund, including:
 - (A) facts concerning the amount of money currently in the fund;
 - (B) the amount of money obligated for corrective actions and ~~third-party liability~~ **ELTF indemnity** claims; and
 - (C) estimates of future revenue for and demands on the fund.
- (2) An overview of the fund claims process.
- (3) A report of the number of claims made against the fund that were approved and denied during the reporting year.

(Underground Storage Tank Financial Assurance Board; [328 IAC 1-2-2](#); filed Dec 4, 1992, 11:00 a.m.: 16 IR 1052; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534; filed Oct 17, 2001, 4:30 p.m.: 25 IR 789; readopted filed May 14, 2007, 1:52 p.m.: [20070523-IR-328070137BFA](#); readopted filed Jul 29, 2013, 9:18 a.m.: [20130828-IR-328130177BFA](#))

SECTION 13. [328 IAC 1-3-1](#) IS AMENDED TO READ AS FOLLOWS:

[328 IAC 1-3-1](#) Fund access

Authority: [IC 13-23](#)

Affected: [IC 13-23-7](#); [IC 13-23-8-4](#); [IC 13-23-9-1.3](#)

Sec. 1. (a) The following persons may apply to the fund for payment of reimbursable costs or for third party liability claims:

- (1) Tank owners and operators, including a person as described in section 3(d) of this rule.
- (2) Persons assigned the right of reimbursement by any person described in subdivision (1).
- (3) Subsequent owners of the property upon which tanks were located, if the tanks were closed by a previous property owner, tank owner, or operator who is eligible, as specified in [IC 13-23-8-4\(e\)](#).

Fund access is limited to eligible parties and those assigned the right of fund access by an eligible party.

(b) Any or all persons listed under subsection (a) may apply to the fund for payment of reimbursable costs or ~~third-party liability~~ **ELTF indemnity** claims if: ~~all of the following have occurred:~~

- (1) ~~A fund qualifying occurrence. To be eligible to be paid from the fund, the occurrence must be a fund qualifying occurrence.~~
- (2) ~~Submission of an initial site characterization (ISC) as described in rules of the solid waste management board at [329 IAC 9-5-5.1](#).~~

(1) the release is an eligible release;

(3) (2) the applicant provides documentation of reimbursable costs incurred equal to:

(A) the appropriate deductible amount as determined by the fund administrator; has been provided: in accordance with [IC 13-23-9-1.3\(a\)](#); and

(B) any additional amount calculated in accordance with [IC 13-23-9-1.3\(b\)](#); and

(4) (3) a claim for the same costs:

(A) has not been submitted to or paid by the fund; a claim for the same costs and

(B) will not be paid more than once by the fund.

~~(c) All claims for payment of reimbursable costs must be submitted within nine (9) months after the fund qualifying occurrence is granted a status of no further action (NFA) by the administrator. All resubmittals associated with any disallowed cost must be received by the department within twelve (12) months after the denial of the claim.~~

~~(d) All occurrences with an existing status of NFA as of the effective date of the 2011 amendments to this article will have:~~

- ~~(1) nine (9) months from the effective date of the 2011 amendments to this article to submit any remaining costs; and~~
- ~~(2) an additional twelve (12) months to resubmit any denied costs.~~

(c) If more than one (1) eligible party submits a claim for reimbursement of costs, the administrator shall determine the appropriate reimbursement based on the:

(1) applicable remediation objectives; and

(2) reasonableness and cost effectiveness of the claims.

(d) The administrator may not reimburse costs related to duplicative acts performed by multiple eligible parties.

(e) The department may:

(1) determine the identity of the tank owner or tank operator based on the notification submitted under [329 IAC 9-2-2](#); the department may and

(2) require an affirmation that an applicant is a person, as described in section 3(d) of this rule, or a subsequent owner of the property, as specified in subsection (a)(3): **an eligible party or assignee thereof.**

~~(f) A person who owns property with a tank is considered a tank owner.~~

~~(g) The fund will not reimburse for the remediation costs arising from the acts or omissions on the part of a contractor, owner, or operator that result in damage to a UST system, a dispensing components or exacerbation of an existing release.~~

~~(h)~~ **(f) Only an owner, operator, or authorized agent may request the status of their tank fee payments and resulting potential percentage of fund eligibility, if applicable.**

(Underground Storage Tank Financial Assurance Board; [328 IAC 1-3-1](#); filed Dec 4, 1992, 11:00 a.m.: 16 IR 1053; filed Jan 9, 1997, 4:00 p.m.: 20 IR 1103; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534; filed Oct 17, 2001, 4:30 p.m.: 25 IR 790; filed Aug 30, 2004, 9:40 a.m.: 28 IR 126; readopted filed Nov 19, 2010, 9:08 a.m.: [20101215-IR-328100553BFA](#); filed Feb 24, 2011, 2:04 p.m.: [20110323-IR-328080684FRA](#); readopted filed Jun 29, 2017, 9:30 a.m.: [20170726-IR-328170227BFA](#))

SECTION 14. [328 IAC 1-3-1.3](#) IS AMENDED TO READ AS FOLLOWS:

[328 IAC 1-3-1.3](#) Cost effectiveness of corrective action

Authority: [IC 13-23-11-7](#)

Affected: [IC 13-23-7](#); [IC 13-23-9-1.5](#)

Sec. 1.3. (a) **The administrator shall determine if the work to be performed or the work already performed, or a portion thereof, under the approved CAP is cost effective** after the person described in section 1 of this rule has **done the following:**

(1) Completed the initial site characterization under [329 IAC 9-5-5.1](#) and the further site investigation under ~~[329 IAC 9-5-6](#)~~ for the release at the site. and

(2) Submitted the information in clauses (A) through (C) to the administrator in a form or format approved by the administrator **as follows:**

(A) For each of the remediation alternatives as required by ~~[329 IAC 9-5-6\(d\)](#)~~, [329 IAC 9-5-6](#), details of the work to be performed and the projected costs.

(B) The approved CAP and **approval letter from the department.**

(C) If appropriate, a demonstration that the selected remediation alternative will substantially reduce or eliminate third party liability; **ELTF indemnity claims.**

~~the administrator will determine if the work to be performed or the work already performed, or a portion thereof, under the approved CAP is cost effective.~~ The administrator may review information concerning cost effectiveness while reviewing a CAP submitted for approval; however, the administrator ~~will~~ **shall** not make a determination on cost effectiveness before a CAP is approved.

(b) ~~The administrator's determination for~~ **administrator shall determine** cost effectiveness ~~will be~~ based on the information in subsection (a) and the following criteria:

(1) The projected costs of the selected remediation alternative compared to the other remediation alternatives.

(2) The likelihood that the remediation approach will achieve the cleanup objectives as set forth in the approved CAP.

(3) The appropriateness of the length of time projected to achieve the cleanup objectives, based on the selected remediation alternative considering actual impacts to human health and the environment.

(4) The cost projections under subsection (a)(2)(A) for the remediation alternatives and the work to be performed do not exceed the reimbursable costs allowed under section 5(a), 5(b), and 5(e) of this rule.

- (5) The ~~cleanup~~ **remediation** objectives as set forth in the approved CAP are sufficient, but no more stringent than necessary, for the current land use for the site.
- (6) A demonstration that the selected remediation alternative will substantially reduce or eliminate ~~third-party liability~~. **ELTF indemnity claims.**

(c) ~~Upon the administrator's request,~~ The applicant shall provide additional information to substantiate the projected work and projected costs **upon request by the administrator.**

(d) At any time, if the administrator finds that the approved CAP will not achieve or is not achieving the cleanup objectives, ~~under 329 IAC 9,~~ then the administrator may determine that the work to be performed under the approved CAP is no longer cost effective. The administrator ~~will~~ **shall** give notice to the applicant of this determination.

(Underground Storage Tank Financial Assurance Board; 328 IAC 1-3-1.3; filed Aug 30, 2004, 9:40 a.m.: 28 IR 126; readopted filed Nov 19, 2010, 9:08 a.m.: 20101215-IR-328100553BFA; readopted filed Jun 6, 2016, 11:51 a.m.: 20160706-IR-328160142BFA)

SECTION 15. [328 IAC 1-3-1.6](#) IS AMENDED TO READ AS FOLLOWS:

[328 IAC 1-3-1.6](#) Preapproval of work

Authority: [IC 13-23-11-7](#)

Affected: [IC 13-23-7](#); [IC 13-23-9-2.2](#)

Sec. 1.6. (a) Persons described in section 1 of this rule may submit to the administrator a request for a preapproval of projected work to be performed **for site characterization in accordance with [328 IAC 1-1-8.5](#) and** under the approved CAP. The request and any additional information requested by the administrator must be in a form or format approved by the administrator. The ~~administrator's preapproval will be based~~ **administrator shall base preapproval of a request** on a determination of the following:

- (1) Cost effectiveness under section 1.3 of this rule.
- (2) That the costs are reasonable.

(b) The administrator may ask for additional information to substantiate the projected work and projected costs.

(c) The administrator ~~will send~~ **shall issue** a preapproval letter ~~to the owner or operator~~ stating how much of the work is preapproved as reasonable and cost effective. This preapproval is not a determination on eligibility under section 3 of this rule.

(Underground Storage Tank Financial Assurance Board; 328 IAC 1-3-1.6; filed Aug 30, 2004, 9:40 a.m.: 28 IR 127; readopted filed Nov 19, 2010, 9:08 a.m.: 20101215-IR-328100553BFA; readopted filed Jun 6, 2016, 11:51 a.m.: 20160706-IR-328160142BFA)

SECTION 16. [328 IAC 1-3-3](#) IS AMENDED TO READ AS FOLLOWS:

[328 IAC 1-3-3](#) Requirements for reimbursements

Authority: [IC 13-23](#)

Affected: [IC 13-23-9-1.3](#); [IC 13-23-12](#)

Sec. 3. (a) A person listed in section 1 of this rule shall comply with the following **requirements** for a claim for reimbursable costs or a ~~third-party liability~~ **an ELTF indemnity** claim to be considered for reimbursement from the fund by the administrator:

- (1) Demonstrate that the requirements in ~~IC 13-23-8-4(a)(1) through IC 13-23-8-4(a)(4)~~ **release is an eligible release.**
- (2) Demonstrate that the initial site characterization (ISC), for the property associated with the release, required by rules of the solid waste management board at [329 IAC 9-5-5.1](#) has been completed and submitted to the department within sixty (60) days of reporting a release to the department. If this requirement is not met, the ELTF eligibility percentage will be reduced by five percent (5%) on the ninety first day. An additional five

percent (5%) will then be deducted for every six (6) months that passes prior to the ISC being submitted to the department. For eligible releases occurring on or after July 1, 2016, or, if the date of occurrence cannot be determined, are discovered on or after July 1, 2016, an eligible party shall submit all:

(A) claims for payment of reimbursable costs related to the ISC conducted under [329 IAC 9-5-5.1](#) within three hundred sixty-five (365) days after submittal of all reports required under [329 IAC 9](#);

(B) remaining claims for payment of reimbursable costs within three hundred sixty-five (365) days after the date those costs were incurred; and

(C) resubmittals associated with any disallowed cost within three hundred sixty-five (365) days after the denial of the claim.

(3) The CAP as required by [IC 13-23-8-4\(a\)\(4\)](#) and [329 IAC 9-5-7](#) must be submitted with projected costs that describe in detail the costs for work to be completed under the CAP. The projected costs must be in a form or format approved by the administrator.

(4) Demonstrate that the tank owner or operator was in substantial compliance with the spill reporting rule or law applicable at the time the release was suspected. For eligible releases that occurred before July 1, 2016, or, if the date of occurrence cannot be determined, were discovered before July 1, 2016, an eligible party shall submit all:

(A) claims for payment of reimbursable costs within three hundred sixty-five (365) days after the eligible release is granted a status of no further action by the administrator; and

(B) resubmittals associated with any disallowed cost within three hundred sixty-five (365) days after the denial of the claim.

(5) When site access is granted by the owner or operator to a third party for the purposes of an environmental investigation, one (1) of the following must be demonstrated:

(A) That within forty-five (45) days from the date the third party accessed the site, the owner or operator requested, in a letter sent by certified mail, the results of the investigation that identified a potential release on that site and reported any spill or release, as required by the rules of the solid waste management board at [329 IAC 9-4-4](#).

(B) The access agreement with the third party specified that the results of the investigation are provided to the owner or operator within forty-five (45) days of sample collection.

If clause (A) or (B) is not met, the ELTF eligibility percentage will be reduced by five percent (5%). An additional five percent (5%) will then be deducted for every six (6) months that passes prior to clause (A) having been met.

(6) Pay all:

(A) past and currently due fees under [IC 13-23-12-1](#); and

(B) interest and penalties that are due under subsections (e) and (f).

Tank fees under [IC 13-23-12-1\(a\)](#) must be paid on any tanks that are not closed in accordance with [329 IAC 9-6-1](#) and are operable or in temporary closure.

(7) For a person who acquires ownership in accordance with subsection (d), make timely payment of all past due tank fees, interest, and penalties in accordance with subsection (f) to make a claim for reimbursable costs for any site characterization or corrective action related to a release that is first suspected, discovered, or confirmed after the payment of all past and currently due fees, interest, and penalties. Tank fees under [IC 13-23-12-1\(a\)](#) must be paid on any tanks that are not closed in accordance with [329 IAC 9-6-1](#) and are:

(A) operable; or

(B) in temporary closure.

(8) Register the tank or tanks within thirty (30) days of the time the tank or tanks were first put into use, even if a release is discovered or confirmed before the tank or tanks were registered. Tanks are considered in use when the tank:

(A) contains or has ever contained a regulated substance; and

(B) has not been closed under [329 IAC 9-6](#).

(9) Comply with the requirements of [IC 13-23](#), [329 IAC 9](#), and this title.

(b) Persons listed in section 1 of this rule shall be reimbursed from the fund according to the following formula:

(1) Determine the number of payments that were owed under [IC 13-23-12-1](#) on all regulated tanks at the facility from which a release occurred:

(A) beginning with the date that the fees for each tank first became due under [IC 13-23-12](#); and

(B) continuing until the date on which the release occurred.

Tank fees under [IC 13-23-12-1\(a\)](#) must be paid on any tanks that are not closed in accordance with [329 IAC 9-6-1](#) and are operable or in temporary closure.

(2) Determine the number of payments actually made under [IC 13-23-12-1](#) on all regulated tanks at the facility from which a release occurred:

(A) beginning with the date each tank became regulated under [IC 13-23](#); and

(B) continuing until the date on which the release occurred.

Divide the number of payments actually made by the number of payments due as determined in subdivision (1).

(3) Determine any additional percentage reduction related to either the ISC submittal in subsection (a)(2) or the third party access agreement in subsection (a)(5).

(4) Determine the amount of money the person would have received from the fund if all payments due on the date the release occurred had been paid when due and multiply the amount by the percentage determined in subdivisions (2) and (3).

(c) Payments that were made or could have been paid four (4) times per year under [IC 13-23-12-3](#) count as one (1) payment for purposes of this section.

(d) A person who acquires ownership or operation of an underground petroleum storage tank under [IC 13-23-8-4.5](#)(2) may not become eligible for reimbursement from the fund for any releases reported after the date that the commissioner receives the "Intent to Acquire UST and Reinstate Eligibility" form (Form) unless the person does the following:

(1) Submits a Form as prescribed by the commissioner at least sixty (60) days prior to acquiring ownership or operation of an underground petroleum storage tank. This form will be kept confidential up to the earlier of the following:

(A) The date of the transfer of the property.

(B) The administrator's receipt of the monies as owed under subsection (e).

(C) Ninety (90) days after the administrator receives the Form.

The administrator will provide a listing of environmental penalties, interest due to the fund, and fees due to the prospective purchaser and the property owner within forty five (45) days of receipt of the Form.

(2) Pays all applicable tank fees, including past due fees, interest, and penalties, for each tank not more than thirty (30) days after the transaction whereby the person acquires ownership or operation of each tank. Tank fees under [IC 13-23-12-1](#)(a) must be paid on any tanks that are not closed in accordance with [329 IAC 9-6-1](#) and are:

(A) operable; or

(B) in temporary closure.

(3) The seller of the underground petroleum storage tank site is liable for any and all unpaid tank fees, interest, and penalties that are assessed by the administrator in accordance with subsection (e). The purchaser is to:

(A) collect all past due tank fees, interest, and penalties from the noncompliant seller; and

(B) remit to the administrator the full amount of the assessment for the subject underground petroleum storage tank provided by the administrator in accordance with subsection (e) prior to a release.

The timely remittance of these monies is a condition of fund eligibility for the purchaser. Tank fees under [IC 13-23-12-1](#)(a) must be paid on any tanks that are not closed in accordance with [329 IAC 9-6-1](#) and are operable or in temporary closure.

(e) Persons listed in section 1 of this rule who fail to pay tank fees when due are subject to payment of interest and penalties on those fees in order to become eligible for the fund. Interest and penalties due include the following:

(1) Penalties and interest due the department of state revenue.

(2) All past due underground storage tank fees under [IC 13-23-12](#). Tank fees under [IC 13-23-12-1](#)(a) must be paid on any tanks that are not closed in accordance with [329 IAC 9-6-1](#) and are:

(A) operable; or

(B) in temporary closure.

(3) An environmental penalty as specified in subsection (f)(2). This penalty will be distributed into the fund and into the petroleum trust fund in accordance with [IC 13-23-12-7](#)(b).

(4) Interest will be charged for the missed fee or fees at the percent per year based on subsection (f) and [IC 6-8.1-10-1](#) until all fees due have been paid in full for each tank. This interest will be deposited into the fund.

Payment of all fees, interest, and penalties due within thirty (30) days of the date of transfer of the subject property is a requirement for fund eligibility for the purchaser.

(f) In addition to all past due fees owed, the amount of interest and penalties owed by a particular owner or operator is to be determined by the following formula:

(1) Interest, under [IC 6-8.1-1-1](#) and [IC 6-8.1-10-1](#), as follows:

Number of delinquent days x daily interest rate = interest due

Interest will be calculated according to [IC 6-8.1-10-1](#).

(2) Penalty as follows:

(A) For sites containing only tanks that were never registered, or sites containing only tanks for which no tank fees were paid when due, the penalty will be calculated at two thousand dollars (\$2,000) under [IC 13-23-12-7\(a\)](#) per petroleum underground storage tank per year that passes after each year's fee is due. The penalty will be calculated by multiplying the total number of years that have passed since the fee was due by the total number of tanks and multiplying the result by two thousand dollars (\$2,000).

(B) For sites with tanks that are registered but not all fees have been completely paid, the penalty will be calculated at one thousand dollars (\$1,000) per petroleum underground storage tank for each missed fee payment. If a quarterly fee payment is missed, the penalty is applied at one fourth (1/4) the amount. The penalty will be calculated by multiplying the total number of years that have passed since the fee was due by the total number of tanks and multiplying the result by one thousand dollars (\$1,000).

(C) The penalty is incurred:

(i) nine (9) months after the fee is due; or

(ii) three (3) months after the final quarterly installment is due.

(D) Penalties will not be collected for fees due before December 1, 2001.

(b) A reduction in reimbursement due to unpaid fees under [IC 13-23-9-1.3](#) does not exempt a UST owner from the requirement to pay any unpaid past due fee. The reduction does not render any fee as paid for the purposes of [IC 13-23-12](#).

(Underground Storage Tank Financial Assurance Board; [328 IAC 1-3-3](#); filed Dec 4, 1992, 11:00 a.m.: 16 IR 1053; filed Jan 9, 1997, 4:00 p.m.: 20 IR 1104; errata, 20 IR 1593; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534; filed Oct 17, 2001, 4:30 p.m.: 25 IR 790; errata filed Feb 27, 2002, 9:58 a.m.: 25 IR 2254; filed Aug 30, 2004, 9:40 a.m.: 28 IR 127; errata filed Oct 7, 2004, 11:45 a.m.: 28 IR 608; readopted filed Nov 19, 2010, 9:08 a.m.: [20101215-IR-328100553BFA](#); filed Feb 24, 2011, 2:04 p.m.: [20110323-IR-328080684FRA](#); readopted filed Jun 29, 2017, 9:30 a.m.: [20170726-IR-328170227BFA](#))

SECTION 17. [328 IAC 1-3-5](#) IS AMENDED TO READ AS FOLLOWS:

[328 IAC 1-3-5](#) Costs

Authority: [IC 13-23](#)

Affected: [IC 13-12-3-2](#); [IC 13-23-3-2](#); [IC 13-23-8-4](#); [IC 13-23-9-1.5](#)

Sec. 5. (a) Reimbursable costs, excluding third party liability claims, are actual monetary amounts paid or incurred for work performed as follows:

(1) Consistent with an approved or deemed approved GAP, an approved site characterization (SC), a no further action letter (NFA) from the commissioner, or under one (1) or more of the provisions of [IC 13-23-8-4\(b\)](#).

(2) Subject to each of the following conditions:

(A) Credits, rebates, refunds, or other similar payments made to the owner or operator or received by the owner, operator, or applicant must be subtracted from the costs submitted for reimbursement.

(B) The work performed was consistent with:

(i) site characterization;

(ii) an approved GAP; or

(iii) emergency measures, as defined in [328 IAC 1-1-5.1](#).

(C) The work performed under the GAP has been determined to be cost effective under section 1.3 of this rule.

(D) The work performed has been determined to be reasonable under [328 IAC 1-1-8.3](#).

(E) The work:

(i) was performed as described in subsection (b) or (c), or both; and

(ii) is not described in subsection (d).

(a) The administrator may pay ELTF claims for costs described under [IC 13-23-9-1.5](#).

(b) Persons listed in section 1 of this rule may employ a certified contractor under [IC 13-23-3-2](#) or may use the owner's or operator's personnel to perform all or part of a corrective action and **Eligible parties** may seek payment from the fund for the following: reimbursable costs of the type described as follows:

(1) Site characterization costs, which include:

- (A) research;
- (B) field time;
- (C) report writing; and
- (D) clerical support.

~~but only after the site characterization has been approved by the administrator.~~

(2) Lodging and per diem costs in accordance with the most current Indiana department of administration financial management circular covering state travel policies and procedures. Mileage ~~shall~~ **must** be calculated at the federal rate for a privately owned automobile under 41 CFR 301-10.303*, in effect on January 1 of each year. ~~Sales of the Code of Federal Regulations are handled by the Superintendent of Documents, P.O. Box 371954, Pittsburgh, PA 15250-7954.~~

(3) Soil, ~~and~~ water, **and vapor** sampling for petroleum and petroleum constituents only as necessary to achieve closure under rules of the solid waste management board at [329 IAC 9](#); **the applicable remediation objectives determined under IC 13-12-3-2.**

(4) Costs for machinery and equipment if prorated based on the:

- (A) normal expected life of the item; and
- (B) length of time the item was used for a single corrective action.

In no event will the fund pay for purchases of machinery and equipment in excess of the market cost of leasing the item for a corrective action. Examples of equipment charges that can be made to the fund are disposable bailers and sample bottles.

(5) Costs for materials and supplies, such as the following:

- (A) Disposable protective equipment.
- (B) Building materials, such as the following:
 - (i) Piping.
 - (ii) Cement.
- (C) Preservatives.

(6) Governmental administrative fees for local, state, or federal permits necessary for **one (1) or both of the following:**

- (A) Corrective action.
- (B) **Site characterization activities.**

(7) Provision of alternate water supply. This cost must have been previously approved by the administrator.

(8) Any other reimbursable costs the administrator finds to be necessary.

(9) Costs associated with transitioning **management of a site to RISC from previous remediation standards to current remediation standards as determined by the department**, if these costs would be less than the costs to complete the remediation under rules of the solid waste management board at [329 IAC 9](#); **the previous remediation standards.**

(10) Only one (1) markup may be taken on any item. **A** markup of not more than ten percent (10%) of the unit rate or the lowest bid ~~will~~ **may** be reimbursed except for the following:

- (A) Travel costs, including mileage, per diem, and lodging.
- (B) Personnel costs, not including labor rates for subcontractors.
- (C) Utilities for temporary facilities.
- (D) Governmental administrative fees for local, state, or federal permits.
- (E) Equipment and supplies:
 - (i) not purchased or rented specifically for use at a facility; or
 - (ii) that are not part of the approved remedial technology.

(11) The fair market value of the cost to obtain access to off-site property if necessary for site characterization or corrective action as reviewed and approved by ~~the~~ office of the attorney general.

(12) Costs for emergency measures ~~including the following as~~ determined to be appropriate by the administrator, **including the following:**

- (A) Evacuation and relocation of a building resident or residents.
- (B) Ventilation of a building or utility conduit.
- (C) Installation and maintenance of an alternate water or treatment system for contaminated drinking water.
- (D) Recovery of free product as necessary to eliminate a release to a utility conduit.
- (E) Installation of a system to mitigate free product migration, actual or potential drinking water impacts, or vapor intrusion into a building or a utility conduit.
- (F) Other emergency measures required by the department.

(13) Compensation paid to technicians for services performed in preparation and submittal of the ELTF claim.

(c) The approval of the site characterization and the CAP ~~under rules of the solid waste management board at 329 IAC 9~~ is not a determination that the actual costs incurred under the site characterization or the CAP are

reimbursable costs under this rule.

(d) The following costs are not reimbursable from the fund:

(1) Costs from releases that occurred before April 1, 1988.

(2) Costs incurred more than twenty-four (24) hours prior to the date and time the release had been reported under the spill reporting rule in effect at the time of the release.

(3) Costs of:

(A) the maintenance of;

(B) the repair of;

(C) upgrading;

(D) removing, unless tank removal is approved as part of the CAP; or

(E) the replacement of;

an underground petroleum storage tank or its associated equipment.

(4) Costs of environmental investigation and remediation not directly related to ~~a fund-qualifying occurrence.~~

an eligible release. Ineligible costs include the cost of testing for nonpetroleum contamination and the cost of vapor or ground water monitoring devices that are not associated with corrective action.

(5) Costs that exceed reimbursable costs even if incurred pursuant to an approved CAP.

(6) The cost of equipment purchases other than those costs routinely required to implement a CAP. Examples of nonreimbursable purchases include the following:

(A) Drilling rigs.

(B) Earth moving equipment.

(C) Photoionization detectors.

(D) Explosimeters.

(E) Hand tools.

(7) The cost of cosmetic improvements, including the repair or replacement of blacktop or concrete, unless directly associated with corrective action **or emergency response activities.**

(8) Lost income or reduced property values unless part of a ~~third party liability~~ **an ELTF indemnity claim.**

(9) Interest or finance charges.

(10) Contractor ~~costs~~ or subcontractor costs not directly related to corrective action activities, such as the following:

(A) Preparing cost estimates.

(B) Reviewing environmental work or documents.

(C) Budgeting.

(D) Changing contractors.

However, eligible parties may seek reimbursement for these costs if the costs meet the requirements in subsection (b)(13).

(11) Fines or penalties imposed by local, state, or federal government agencies.

(12) Punitive or exemplary damages.

(13) Any costs for remediation of contamination not shown to be at concentrations exceeding the risk integrated system of closure (RISC) as described in [IC 13-23-8-4\(a\)\(4\)\(A\)\(ii\)](#) industrial cleanup standards with the following exceptions:

(A) **accomplish the applicable remediation objectives determined under [IC 13-12-3-2](#), except for** ground water contamination affecting a public or private drinking water well. ~~on-site or off-site.~~

(B) ~~Off-site contamination at concentrations exceeding RISC residential cleanup standards, not including:~~

~~(i) roadways;~~

~~(ii) railroads; or~~

~~(iii) other property not currently used as residential property.~~

(14) Any costs related to the excavation and disposal of more than one thousand five hundred (1,500) tons of soil unless:

(A) alternative remediation techniques have been considered;

(B) excavation and disposal was shown to be the most cost-effective remediation option; and

(C) the soil removal is part of a CAP approved ~~or deemed approved~~ by the administrator.

(15) Any other cost not directly related to site characterization, corrective action, or ~~third party liability~~ **ELTF indemnity claims** or otherwise determined not to be reimbursable under this rule as a result of a financial or technical review.

~~(16) If:~~

~~(A) a release has occurred before the tank or tanks were registered; and~~

~~(B) the tank or tanks were not registered within thirty (30) days from the time the tank or tanks were first put into use;~~

~~a claim is not reimbursable from the fund by the administrator. Tanks are considered in use when the tank~~

~~contains or has ever contained a regulated substance and has not been closed under 329 IAC 9-6.~~

(16) Remediation costs arising from the acts or omissions on the part of a contractor, owner, or operator that result in:

(A) damage to:

(i) a UST system; or

(ii) dispensing components; or

(B) exacerbation of an existing release.

(17) Any costs to purchase equipment, which was previously purchased and the cost was previously reimbursed from the fund.

(18) Any costs incurred after receipt of notice by the administrator under section 1.3(d) of this rule that the approved CAP is not successfully remediating the site, except the following ~~costs~~ necessary **costs**, until ~~such time as~~ the modified CAP is approved: ~~to:~~

(A) ~~Develop~~ **Development** of the modified CAP, including pilot studies or additional investigation.

(B) ~~Demobilize~~ **Demobilization** of the corrective action system currently at the site.

(C) ~~Abandon~~ **Abandonment** of monitoring, extraction, or other wells associated with the CAP.

(D) ~~Maintain~~ **Maintained** compliance with applicable regulations and permits, including quarterly ground water monitoring.

(E) ~~Maintain~~ **Maintenance**, but not ~~operate~~ **operation**, of the corrective action system.

(19) Credits, rebates, refunds, or other similar payments made to the owner or operator or received by the owner, operator, or applicant.

(e) Costs that may be paid from the fund are ~~set forth in the following:~~ **as follows:**

Activity	Cost Range or Maximum Amount
SITE CHARACTERIZATION	
Direct push technology (other costs pertaining to direct push technology are included in the per foot allowance specified).	\$600 per day
In addition to the day rate, costs for boring advancement may be invoiced at the following per foot rates:	\$6 per foot
Mobilization and demobilization. This includes the cost of moving general contractor owned equipment, setup, and removing equipment.	\$400
Soil borings, for purposes of soil or ground water sampling or monitoring well installation when using a hollow stem auger.	
Number of feet in incremental amounts	
4.25 inch inside diameter	
For the first 15 feet	\$24 per foot
16 through 25 feet	\$30 per foot
26 feet or more	\$35 per foot
6.25 inch inside diameter	
For the first 15 feet	\$27 per foot
16 through 25 feet	\$33 per foot
26 feet or more	\$38 per foot
8.25 inch inside diameter	
For the first 15 feet	\$30 per foot
16 through 25 feet	\$36 per foot
26 feet or more	\$41 per foot
Rock drilling beyond auger refusal will be is reimbursed at the above rates with an additional \$15 per foot.	
These amounts may only be charged one (1) time per borehole.	
Sample collection is part of well installation. Direct push technology must be used when it is most appropriate to the site and cost effective. The diameter of the boring must be appropriate for the size of the well being installed.	
Blind drilling using a hollow stem auger when well borings have already been logged within five (5) feet.	
4.25 inch inside diameter	
For the first 50 feet	\$10 per foot
51 feet or more	\$12 per foot

6.25 inch inside diameter	
For the first 50 feet	\$13 per foot
51 feet or more	\$15 per foot
8.25 inch inside diameter	
For the first 50 feet	\$15 per foot
51 feet or more	\$18 per foot
Decontamination and equipment cleaning	\$12 per each 5 feet of boring
Cutting holes in concrete or asphalt (12 inches in diameter)	\$110 per hole
Materials	
Well casing and screen (including riser) filter pack, annular, and surface seal:	
< 2 inch well	Applicable boring rate plus materials
2 inch well	\$9 per foot
4 inch well	\$15 per foot
6 inch well	\$27 per foot
Flush-grade well covers	\$125 per cover
Laboratory services, including containers, packaging, and postage.	
Soil analysis methods	
TPH-8015 GRO	\$50 per sample
TPH-8015 DRO	\$50 per sample
TPH-8015 ERO	\$50 per sample
TPH-418.1	\$95 per sample
TRPH-HEM-1664/9071B	\$60 per sample
VOC-8260	\$130 per sample
SVOC-8270	\$225 per sample
PAH-8270SIM	\$130 per sample
PAH-8310	\$150 per sample
PCB-8082	\$110 per sample
Metals- 7 barium, cadmium, chromium, lead, mercury, nickel, zinc	\$100 per sample
(Individual metals)	\$10 per sample
BTEX/MTBE-8021	\$60 per sample
BTEX/MTBE-8260	\$80 per sample
Ignitability	\$30 per sample
Fraction of organic carbon	\$70 per sample
Water analysis methods	
TPH-8015 GRO	\$50 per sample
TPH-8015 DRO	\$50 per sample
TPH-8015 ERO	\$50 per sample
TPH-8015 Methane	\$80 per sample
TRPH-HEM-1664	\$50 per sample
VOC-8260	\$135 per sample
BTEX/MTBE-8021	\$50 per sample
BTEX/MTBE-8260	\$80 per sample
SVOC-8270	\$225 per sample
PAH-8270 SIM	\$135 per sample
PAH-8310	\$150 per sample
Metals- 7 barium, cadmium, chromium, lead, mercury, nickel, zinc	\$100 per sample
(Individual metals)	\$10 per sample
Metal-soluble iron	\$25 per sample
Nitrates	\$25 per sample
Sulfate	\$25 per sample
Sulfide	\$25 per sample
COD	\$20 per sample
BOD ₅	\$40 per sample

Total suspended solids	\$20 per sample
Air analysis methods	
VOC–TO–15	\$400 per sample
Other Methods	
TCLP–lead	\$100 per sample
If the commissioner requires all quality assurance/quality control (QA/QC), including raw data and internal chain of custody necessary to validate analytical results.	20% markup allowed per sample

PERSONNEL

When submitting a claim for reimbursement, the applicant ~~shall be~~ **is** required to give the personnel classification, task being performed, and the name of the individual performing the task. Rates ~~will be~~ **are** paid based on the task performed by an employee rather than the qualifications of the employee. Refer to subsection (f) for task descriptions for personnel classifications. These labor rates ~~will be~~ **are** adjusted annually on June 1 of each year, in accordance with the product price index (PPI) percentage listed for December of the previous year. The North American Industry Classification System (NAICS) Code for Environmental Consulting Services is 541620 and is described at:

<http://www.naics.com/censusfiles/ND541620.HTM>

<https://www.naics.com/naics-code-description/?code=541620>

The PPI Industry data tables are available through the Bureau of Labor and Statistics (BLS) at: <http://www.bls.gov/ppi/home.htm>

Principal	\$136 per hour
Senior project manager	\$126 per hour
Project manager	\$103 per hour
Staff project person	\$87 per hour
Field Field/ELTF claims technician	\$59 per hour
Drafting person	\$50 per hour
Word processor/clerical	\$35 per hour
Toxicologist	\$155 per hour

INITIAL ABATEMENT AND FREE PRODUCT REMOVAL

Except where provided in this rule, approval of costs ~~will be~~ **is** on a case-by-case basis.

SITE SET-UP PREPARATION

Trailer rental	\$360 per month (\$12 per day)
Portable toilet	\$180 per month (\$6 per day)
Utility check, the date and time of the utility check must be documented.	
Utility check includes air knifing, hand augering, and private utility location service.	\$800
Utilities for temporary facilities	
Temporary power	\$600 per month (\$20 per day)
Temporary water	\$180 per month (\$6 per day)
Temporary phone	\$240 per month (\$8 per day)

DEMOLITION

Three (3) bids must be submitted for demolition of structures in accordance with an approved CAP ~~must submit three (3) bids~~ for reimbursement consideration as defined under CORRECTIVE ACTION TECHNOLOGIES.

EXCAVATION

Activities in accordance with an approved CAP ~~will be~~ **are** considered for reimbursement based upon the submittal of three (3) bids as defined under CORRECTIVE ACTION TECHNOLOGIES or the following unit rates:

Equipment costs and labor	\$2.70 per ton
Mobilization (includes vehicle mileage)	\$400 per trailer
Stockpiling soil on-site	\$1.65 per ton

Tank removal, decommissioning, cutting, and disposal are not eligible for reimbursement unless approved as part of corrective action.

Under 1,000 gallons	\$1,200 per tank
1,000 through 5,999 gallons	\$1,800 per tank
6,000 through 10,000 gallons	\$2,400 per tank
Above 10,000 gallons	\$3,000 per tank

Costs for pumping, testing, and disposal of tank contents are not eligible for reimbursement.

Three (3) bids must be submitted for demolition of structures in accordance with an approved CAP ~~must submit three (3) bids~~ for reimbursement consideration as defined under CORRECTIVE ACTION TECHNOLOGIES.

Mobilization (includes vehicle mileage)

\$400 per trailer

Concrete and asphalt removal

Saw concrete, prices are per linear foot

	4 inch concrete	6 inch concrete
Under 200 feet	\$1.60 per foot	\$2.40 per foot
200 through 400 feet	\$1.70 per foot	\$2.20 per foot
400 through 600 feet	\$1.60 per foot	\$2.10 per foot
600 through 1,000 feet	\$1.45 per foot	\$2 per foot
Over 1,000 feet	\$1.30 per foot	\$1.80 per foot

Saw asphalt, prices are per linear foot

	3 inch asphalt	4 inch asphalt	6 inch asphalt
Under 450 feet	\$2.20 per foot	\$2.30 per foot	\$3.60 per foot
450 through 600 feet	\$1.80 per foot	\$2.20 per foot	\$2.50 per foot
600 through 1,000 feet	\$1.60 per foot	\$1.80 per foot	\$2.20 per foot
Over 1,000 feet	\$1.50 per foot	\$1.60 per foot	\$1.80 per foot

Hauling

The administrator ~~will also~~ **shall** approve hauling costs based on three (3) bids.

TRANSPORTATION

Activities in accordance with an approved CAP ~~will be~~ **are** considered for reimbursement based upon the submittal of three (3) bids as defined under CORRECTIVE ACTION TECHNOLOGIES or the following unit rates:

Loading	\$1.65 per ton
Mobilization (includes vehicle mileage)	\$400 per trailer
Hauling mileage must be documented	\$85 per hour per truck
For excavation, stockpiling, and loading of less than 300 tons in a single day.	\$1,200 per day or the actual cost, whichever is less

DISPOSAL OF SOIL, GROUND WATER, AND TRASH

Landfill fees

Sampling required by landfill. ~~Must include Receipts and analytical results from local municipality~~ **must be included.**

Sanitary sewer, if approved for disposal of treated ground water. ~~Must include Receipts~~ **must be included.**

Contaminated or disposable equipment and decontamination fluids.

Landfill reimbursement ~~will~~ **must** not exceed the least expensive combination of documented hauling costs and documented disposal costs at a permitted landfill. Applicant must submit a cost justification if the applicant does not use the nearest land disposal facility permitted and willing to accept the applicant's waste.

CORRECTIVE ACTION TECHNOLOGIES

The maximum costs for the work done for corrective action ~~will be~~ **are** allowed on the basis of the lowest of three (3) comparable, competitive bids for the work specified in the approved CAP. Bids for the work specified in the CAP must include bids for installation and labor; however, separate bids may be obtained for cost of installation and labor.

Copies of the request for proposal (RFP) for implementation

of CAP that was sent to each vendor must be submitted. Each RFP and bid submittal ~~will be~~ **is** required to show a line item breakdown of the tasks to be performed in order to verify that all tasks are eligible for reimbursement. The administrator ~~can~~ **may** approve costs based on less than three (3) bids if a demonstration is provided to the administrator that lower costs for the specified work is not possible or practical.

Lease or rental on equipment ~~will~~ **must** not be reimbursed above the purchase price.

SITE RESTORATION

Activities in accordance with an approved CAP ~~will be~~ **are** considered for reimbursement based upon the submittal of three (3) bids as defined under CORRECTIVE ACTION TECHNOLOGIES or the following unit rates:

Backfill hauling	\$85 per hour per truck
Backfill material	\$18 per ton of stone
	\$9 per ton of soil
Backfill placement, compaction, and density verification	\$6 per ton
Resurfacing	
4 inch concrete	\$5 per square foot
For each additional inch of concrete	Add \$0.75 per square foot
For rebar	Add 15%
Asphalt pad, 4 inch thickness	\$2.75 per square foot
Asphalt curb and gutter	\$6 per linear foot
Island forms	
4 feet by 10 feet with 2 foot bumpers	\$900 each
4 feet by 16 feet with 2 foot bumpers	\$1,400 each
Equipment rental (based on daily rate; not an inclusive list)	
Decontamination equipment (bucket, brushes, and detergent)	\$15
Power auger	\$60
Hand auger sampling kit (hand auger/brass sleeves)	\$42
Slide hammer core sampler	\$42
Photoionization detector	\$90
Flame ionization detector	\$135
LED/O ₂ meter	\$60
pH and conductivity meter	\$24
Dissolved oxygen meter	\$36
Oxidation/reduction meter (REDOX)	\$50
Multiparameter water quality meter including pH, dissolved oxygen, temperature, and conductivity	\$60
Ferrous iron field test	\$8 per sample
Hydrogen sulfite field test	\$8 per sample
Geographic positioning system (GPS) unit for site mapping to 1 foot accuracy	\$120
2 inch submersible pump	\$140
4 inch submersible pump	\$115
Steam cleaner/pressure washer	\$90
Water level indicator	\$15
Oil/water interface probe	\$70
Bailer rental	\$20
Anemometer	\$42
Carbon dioxide meter	\$30
Portable generator, generator ≤ 5kW	\$60
Portable generator, generator ≤ 10kW	\$120
Portable generator, generator > 10kW	\$150

(f) The following categories describe the personnel classification activity descriptions:

(1) The principal ~~will~~ **shall** do the following:

- (A) Serve as technical expert on sites.
- (B) Limited site visits on projects.
- (C) Coordinate legal matters with attorneys.

(2) The senior project manager (limited to licensed professional geologist or hydrogeologist (LPG), registered professional engineer (PE), certified hazardous materials manager (CHMM), professional soil scientist, or at least five (5) years professional remediation experience) ~~will~~ **shall** provide the following:

- (A) Project planning/oversight.
- (B) Final review of project documents.
- (C) Acquisition of and negotiation with subcontractors.
- (D) Hydrogeologic and contaminant modeling.
- (E) Remediation system design.
- (F) **Risk integrated system of closure (RISC) evaluation.**

(3) The project manager ~~will~~ **shall** provide the following:

- (A) ~~Remediation work plan and~~ Technical document preparation **required by [329 IAC 9](#)** (CAP, ISC, FSI, pilot study, **etc.**).
- (B) Site work preparation and planning.
- (C) Supervision of investigation and remediation activities.
- (D) Oversight of waste characterization, transportation, and disposal.
- (E) ~~RISC Statistics and equations~~ **required by the department for corrective action in accordance with applicable guidance.**
- (F) Coordination of subcontractor work (drillers, plumbers, and electricians).
- (G) Coordination of heavy equipment mobilization.
- (H) Coordination with the department and the client.
- (I) Site access/permitting.

(4) The staff project person ~~will~~ **shall** do the following:

- (A) Implement remediation system installation, operation, and maintenance.
- (B) Conduct site mapping.
- (C) Oversee installation of soil borings and monitoring wells.
- (D) Provide on-site supervision or perform site characterization and remediation activities, or both.
- (E) Oversee well water records searches.
- (F) ~~Define how site utilities are marked.~~ **Request, oversee, or identify and mark utility location on the site.**
- (G) Survey wells.
- (H) Oversee free product removal.
- (I) Oversee quarterly sampling.

(5) The ~~field~~ **field/ELTF claims** technician ~~will~~ **shall** perform the following:

- (A) Well purging and development.
- (B) Sample collection, preparation, and delivery.
- (C) Decontamination/site cleanup tasks.
- (D) Assist with waste characterization, transportation, and disposal, including drum labeling/disposal.
- (E) Activities associated with the operation and maintenance of remediation systems.
- (F) **Activities associated with preparation and submittal of the ELTF claim.**

(6) The drafting person ~~will~~ **shall** do the following:

- (A) Provide ~~CADD~~ **computer-aided design drafting** work.
- (B) Generate the following:
 - (i) Drawings.
 - (ii) Maps and plans.
 - (iii) Boring logs.
 - (iv) Monitoring well installation logs.
- (C) Revise drawings and maps and plans.

(7) The word processor/clerical ~~will~~ **person shall** provide the following:

- (A) Word processing/data input.
- (B) General clerical duties.
- (C) Documentation reproduction, report binding, and filing.
- (D) Proofreading/editing.

(8) The toxicologist ~~will~~ **shall** provide guidance for ~~nondefault~~ risk-based closures utilizing ~~nondefault~~ toxicological parameters.

(g) Attorney costs ~~will be~~ **are** considered for reimbursement as follows:

(1) Attorney costs ~~will be~~ **are** reimbursed under the following circumstances:

(A) An attorney acting as a principal, senior project manager, or project manager on a site directing field investigations or preparing the technical reports related to investigative or remediation activities. In this instance, the attorney must have the appropriate technical credentials required for an individual performing these tasks, such as PE, LPG, CHMM, or soil scientist.

(B) An attorney communicating to the department regarding remediation actions, preparing restrictive covenants, or access negotiations.

(C) Fees charged that do not exceed one thousand dollars (\$1,000) for either environmental restrictive covenant preparation or access negotiation.

(2) An attorney ~~will~~ **may** not be reimbursed for the following:

(A) Reviewing consultant reports.

(B) Charging fees in excess of the principal, senior project manager, or project manager as defined in this rule for the same personnel activities. Fees charged must also appropriately correspond to tasks performed.

***This document is incorporated by reference. Copies may be obtained from the Government Publishing Office, www.gpo.gov, or are available for review at the Indiana Department of Environmental Management, Office of Legal Counsel, Indiana Government Center North, Thirteenth Floor, 100 North Senate Avenue, Indianapolis, IN 46204.**

(Underground Storage Tank Financial Assurance Board; [328 IAC 1-3-5](#); filed Dec 4, 1992, 11:00 a.m.: 16 IR 1054; filed Nov 1, 1995, 8:30 a.m.: 19 IR 343; filed Jan 9, 1997, 4:00 p.m.: 20 IR 1105; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534; filed Oct 17, 2001, 4:30 p.m.: 25 IR 792; errata filed Feb 27, 2002, 9:58 a.m.: 25 IR 2255; filed Aug 30, 2004, 9:40 a.m.: 28 IR 129; readopted filed Nov 19, 2010, 9:08 a.m.: [20101215-IR-328100553BFA](#); filed Feb 24, 2011, 2:04 p.m.: [20110323-IR-328080684FRA](#); readopted filed Jun 29, 2017, 9:30 a.m.: [20170726-IR-328170227BFA](#))

SECTION 18. [328 IAC 1-4-1](#) IS AMENDED TO READ AS FOLLOWS:

[328 IAC 1-4-1](#) General procedure for prioritization

Authority: [IC 13-23](#)

Affected: [IC 6-6-1.1-103](#); [IC 13-12-3-2](#); [IC 13-23-9-4](#)

Sec. 1. (a) ~~The following shall~~ **procedures in this section** apply in the event the unencumbered balance, less the unpaid, approved claims for reimbursable costs and ~~third party liability~~ **ELTF indemnity** claims, in the fund falls below **the following**:

(1) Twenty-five million dollars (\$25,000,000). ~~the releases will be categorized according to this section.~~

(2) Five million dollars (\$5,000,000), **with** the prioritized claims, based on the categorized releases, ~~will be paid according to~~ **in accordance with** section 4 of this rule.

The administrator may invoke ~~these procedures~~ **this section** prior to the unencumbered fund balance, less the unpaid, approved claims for reimbursable costs and ~~third party liability~~ **ELTF indemnity claims**, falling below the amounts specified in subdivision (1) or (2).

(b) All claims or parts of claims submitted to the administrator for an emergency measure ~~as defined under [328 IAC 1-1-5.1](#), will be~~ **are** paid first. If the claim or part of the claim is for work performed that has not been determined to be an emergency measure, ~~as defined under [328 IAC 1-1-5.1](#), the claim or part of the claim for that work will be~~ **is** paid:

(1) according to the category of the ~~fund qualifying occurrence~~ **eligible release** as determined in subsection (c); **and**

(2) **after the payment of all claims or parts of claims for emergency measures.**

(c) After the initial site characterization, further site investigation, or a corrective action progress report is completed, ~~the fund qualifying occurrence will be~~ **eligible release is** placed in the lowest numbered category for which it qualifies as follows, and all claims for reimbursement of costs and ~~third party liability shall be~~ **ELTF indemnity claims are** paid in numerical order of the ~~fund qualifying occurrence~~ **eligible release** category subject to the release recategorization provisions under section 3 of this rule:

(1) **An eligible release is considered a category 1 eligible release** if the administrator determines, based on the most recent information submitted to the administrator, that **at least one** (1) of the following has

occurred and it is attributable to the ~~fund-qualifying occurrence~~, then the ~~fund-qualifying occurrence~~ is considered a category 1 fund-qualifying occurrence and claims for that ~~fund-qualifying occurrence~~ shall be paid after all approved claims for emergency measures are paid as provided in subsection (b): **eligible release:**

(A) Petroleum or petroleum constituents **that exceed ten percent (10%) lower explosive limit (LEL)** are detected in a structure or a utility conduit, such as a:

- (i) storm sewer;
- (ii) sanitary sewer; or
- (iii) utility conduit.

~~that exceed ten percent (10%) lower explosive limit (LEL).~~

(B) Vapors for petroleum or petroleum constituents are detected in an ~~inhabitable~~ a building in **at levels greater than long-term, risk-based exposure the appropriate screening levels as specified by the department in accordance with the remediation standards determined under [IC 13-12-3-2](#)** for contaminants of concern.

(C) Petroleum or petroleum constituents are detected in a drinking water well at or above ~~maximum contamination levels (MCLs) or RISC residential~~ **the appropriate screening levels for ground water cleanup objectives as specified by the department in accordance with the remediation standards determined under [IC 13-12-3-2](#)** at the point of compliance or at the tap.

(2) **An eligible release is considered a category 2 eligible release** if the administrator determines, based on the most recent information submitted to the administrator, that **at least one (1)** of the following has occurred and is attributable to the ~~fund-qualifying occurrence~~, then the ~~fund-qualifying occurrence~~ is considered a category 2 fund-qualifying occurrence and claims for that ~~fund-qualifying occurrence~~ shall be paid after all approved claims for category 1 fund-qualifying occurrences are paid as provided in subdivision (1): **eligible release:**

(A) Petroleum or petroleum constituents are detected in free phase in a thickness of at least one (1) foot in any one (1) well, or at least one (1) inch in two (2) or more wells where the wells are at least twenty (20) feet apart, provided that the wells are not screened in the underground storage tank cavity backfill.

(B) Petroleum or petroleum constituents are detected in surface water above water quality standards under ~~rules of the water pollution control board at~~ [327 IAC 2](#).

(3) **An eligible release is considered a category 3 eligible release** if the administrator determines, based on the most recent information submitted to the administrator, that **at least one (1)** of the following has occurred and is attributable to the ~~fund-qualifying occurrence~~, then the ~~fund-qualifying occurrence~~ is considered a category 3 fund-qualifying occurrence and claims for that ~~fund-qualifying occurrence~~ shall be paid after all approved claims for category 2 fund-qualifying occurrences are paid as provided in subdivision (2): **eligible release:**

(A) Petroleum or petroleum constituents are detected off-site in ground water at concentrations exceeding ~~RISC cleanup standards~~ **the appropriate screening levels as specified by the department in accordance with the remediation standards determined under [IC 13-12-3-2](#)** for the land use of the off-site location.

(B) Petroleum or petroleum constituents are detected off-site in soil at concentrations exceeding ~~RISC cleanup standards~~ **the appropriate screening levels as specified by the department in accordance with the remediation standards determined under [IC 13-12-3-2](#)** for the land use of the off-site location.

(C) Petroleum or petroleum constituents are present in free phase in a thickness of at least one-sixteenth (1/16) inch in any well.

(D) Petroleum or petroleum constituents, attributable to a gasoline release, are detected in the ground water at concentrations exceeding ~~RISC cleanup standards~~ for the appropriate **screening levels as specified by the department in accordance with the remediation standards determined under [IC 13-12-3-2](#)** for the land use. For the purposes of this clause, gasoline has the meaning set forth in [45 IAC 12-1-7](#). **[IC 6-6-1.1-103\(g\)](#)**.

(4) **An eligible release is considered a category 4 eligible release** if the administrator determines, based on the most recent information submitted to the administrator, that **at least one (1)** of the following has occurred and is attributable to the ~~fund-qualifying occurrence~~, then the ~~fund-qualifying occurrence~~ is considered a category 4 fund-qualifying occurrence and claims for that ~~fund-qualifying occurrence~~ shall be paid after all approved claims for category 3 fund-qualifying occurrences are paid as provided in subdivision (3): **eligible release:**

(A) Petroleum or petroleum constituents are detected in on-site ground water at concentrations exceeding ~~RISC industrial cleanup standards~~, **the appropriate screening levels as specified by the department in accordance with the remediation standards determined under [IC 13-12-3-2](#)**, in two (2) or more wells, where the wells are at least twenty (20) feet apart, where neither well is screened in the underground storage tank cavity backfill.

(B) Petroleum or petroleum constituents are detected in on-site soil at concentrations exceeding ~~RISC~~

~~industrial cleanup standards; the appropriate screening levels as specified by the department in accordance with the remediation standards determined under [IC 13-12-3-2](#), in at least two (2) boring holes at least twenty (20) feet apart.~~

(5) ~~A fund-qualifying occurrence~~ **An eligible release** that does not qualify as a category 1, 2, 3, or 4 category ~~will be~~ **eligible release** is considered a category 5 ~~fund-qualifying occurrence~~ **eligible release**.

(6) Claims in the same category ~~will be~~ **are** paid in chronological order according to the date and time received by the administrator as indicated by the date and time stamped by the administrator on the claim submitted to the administrator.

(d) ~~Fund-qualifying occurrences shall~~ **Eligible releases must** be initially categorized according to those conditions that existed at the time the first claim was submitted after prioritization was initiated.

(e) Claims determined to ~~not be unreimbursable~~ **reimbursable** may be revised and resubmitted to the fund. The date and time of the revised claim for the purposes of subsection (c)(6) ~~shall~~ **must** be based on the date and time that the fund administrator receives the revised claim as indicated by the date and time stamped by the administrator on the claim submitted to the administrator.

(f) An applicant may request a review of a denial of payment using the procedures set forth in [IC 13-23-9-4](#).

(g) Categorization of a ~~fund-qualifying occurrence~~ **an eligible release** or placement of a claim on a priority list does not constitute a commitment to reimburse corrective action or ~~third-party liability~~ **ELTF indemnity claim** costs.

(Underground Storage Tank Financial Assurance Board; [328 IAC 1-4-1](#); filed Dec 4, 1992, 11:00 a.m.: 16 IR 1055; filed Nov 1, 1995, 8:30 a.m.: 19 IR 347; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534; filed Oct 17, 2001, 4:30 p.m.: 25 IR 799; filed Aug 30, 2004, 9:40 a.m.: 28 IR 137; errata filed Oct 7, 2004, 11:45 a.m.: 28 IR 608; readopted filed Nov 19, 2010, 9:08 a.m.: [20101215-IR-328100553BFA](#); filed Feb 24, 2011, 2:04 p.m.: [20110323-IR-328080684FRA](#); readopted filed Jun 29, 2017, 9:30 a.m.: [20170726-IR-328170227BFA](#))

SECTION 19. [328 IAC 1-4-3](#) IS AMENDED TO READ AS FOLLOWS:

[328 IAC 1-4-3](#) Recategorization of eligible releases

Authority: [IC 13-23](#)

Affected: [IC 13-23-9-2](#); [IC 13-23-9-4](#)

Sec. 3. (a) To ~~assure~~ **ensure** the efficient administration of the fund, the administrator may recategorize a ~~fund-qualifying occurrence~~ **an eligible release** at any time that it is determined a ~~fund-qualifying occurrence~~ **an eligible release** has been incorrectly categorized as follows:

- (1) The administrator ~~will~~ **shall** notify the applicant by mail of the new category.
- (2) The applicant may petition the administrator to be put in a lower number category, with category 1 being the lowest, based on new information.
- (3) If the administrator approves placement in a lower number category, the applicant may seek reimbursement under the new category for any costs incurred subsequent to the placement in the new category.
- (4) If the administrator approves placement in a higher number category with **category** 5 being the highest category, the applicant has fifteen (15) days after the date of the notification to submit current costs under the new category.

(b) ~~Fund-qualifying occurrences~~ **Eligible releases** may be recategorized based on:

- (1) the current environmental conditions;
- (2) information indicating the elimination or abatement of the condition or conditions that led to the placement of a ~~fund-qualifying occurrence~~ **an eligible release** in a category;
- ~~(3) other information available to the administrator demonstrates that recategorization is appropriate; or~~
- ~~(4) (3) the discovery of the event that led to the placement in a lower category with category 1 being the lowest; or~~
- (4) other information available to the administrator demonstrates that recategorization is appropriate.**

(c) Except as provided in sections 1.5 and 3(a) of this rule, **subsection (a)**, the priority of a claim is determined by the category of the ~~fund-qualifying occurrence~~ **eligible release** at the time the claim is approved by the administrator and by section 1(c)(6) of this rule.

(Underground Storage Tank Financial Assurance Board; [328 IAC 1-4-3](#); filed Dec 4, 1992, 11:00 a.m.: 16 IR 1055; filed May 25, 1999, 4:31 p.m.: 22 IR 3103; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534; filed Aug 30, 2004, 9:40 a.m.: 28 IR 141; errata filed Oct 7, 2004, 11:45 a.m.: 28 IR 608; readopted filed Nov 19, 2010, 9:08 a.m.: [20101215-IR-328100553BFA](#); filed Feb 24, 2011, 2:04 p.m.: [20110323-IR-328080684FRA](#); readopted filed Jun 29, 2017, 9:30 a.m.: [20170726-IR-328170227BFA](#))

SECTION 20. [328 IAC 1-4-4](#) IS AMENDED TO READ AS FOLLOWS:

[328 IAC 1-4-4](#) Monthly reimbursement

Authority: [IC 13-23](#)

Affected: [IC 13-23-7-2](#); [IC 13-23-9-2](#); [IC 13-23-9-4](#)

Sec. 4. **(a)** After priority payment under section 1(a)(2) **of this rule** is initiated, the total amount reimbursed from the fund in any calendar month must not exceed the fund revenue of the previous month, less the administrative expenses of the fund. ~~However,~~ The administrator must adjust the total amount reimbursed from the fund in any calendar month as necessary to maintain a fund balance of at least five million dollars (\$5,000,000).

(b) For purposes of this section, "fund revenue" means any or all sources of money as described in [IC 13-23-7-2](#).

(Underground Storage Tank Financial Assurance Board; [328 IAC 1-4-4](#); filed Aug 30, 2004, 9:40 a.m.: 28 IR 141; errata filed Oct 7, 2004, 11:45 a.m.: 28 IR 608; readopted filed Nov 19, 2010, 9:08 a.m.: [20101215-IR-328100553BFA](#); readopted filed Jun 6, 2016, 11:51 a.m.: [20160706-IR-328160142BFA](#))

SECTION 21. [328 IAC 1-4-5](#) IS AMENDED TO READ AS FOLLOWS:

[328 IAC 1-4-5](#) Discontinuation of prioritization

Authority: [IC 13-23](#)

Affected: [IC 13-23-9-4](#)

Sec. 5. (a) At any time after the administrator has invoked prioritization procedures, the administrator may discontinue the categorization of ~~fund-qualifying occurrences~~ **eligible releases** and the prioritization of claims if the administrator determines that the unencumbered balance, less the unpaid, approved claims for reimbursable costs and ~~third-party liability~~ **ELTF indemnity claims** is greater than twenty-five million dollars (\$25,000,000).

(b) In the event that monies are deposited in or appropriated to the fund in an amount exceeding twenty-five million dollars (\$25,000,000) in any calendar month, the administrator shall first apply the monies to restore the balance of the fund to an unencumbered balance, less the unpaid, approved claims for reimbursable costs and ~~third-party liability~~, **ELTF indemnity claims**, of twenty-five million dollars (\$25,000,000). In that event, the administrator shall discontinue the prioritization procedures.

(Underground Storage Tank Financial Assurance Board; [328 IAC 1-4-5](#); filed Aug 30, 2004, 9:40 a.m.: 28 IR 141; readopted filed Nov 19, 2010, 9:08 a.m.: [20101215-IR-328100553BFA](#); filed Feb 24, 2011, 2:04 p.m.: [20110323-IR-328080684FRA](#); readopted filed Jun 29, 2017, 9:30 a.m.: [20170726-IR-328170227BFA](#))

SECTION 22. [328 IAC 1-5-1](#) IS AMENDED TO READ AS FOLLOWS:

[328 IAC 1-5-1](#) Applications for payment of reimbursable costs

Authority: [IC 13-23](#)

Affected: [IC 13-23](#)

Sec. 1. (a) Claim applications for reimbursement shall **must** be submitted on forms adopted **approved** by the administrator. Applicants shall itemize all reimbursable costs as required by the application package. Documentation of reimbursable costs as required by the administrator must be submitted as part of the application. The administrator may request additional information and records to substantiate claims submitted including the following:

- (1) A copy of original employee time sheets.
- (2) Invoices relating to purchase or other acquisition of equipment and supplies used for corrective action.
- (3) Copies of requests for bids for work specified in the CAP.

(b) The application shall **must** contain the following statement, which shall **must** be signed and attested by the person applying to the fund: "I swear or affirm to the best of my knowledge and belief that the costs presented herein represent the reimbursable costs actually incurred in the performance of site characterization or corrective action related to this site during the period of time indicated on this application. I also swear or affirm that all charges presented as part of this application were necessary to the performance of site characterization or corrective action." If the person applying has been assigned the right to reimbursement under this rule, the person who assigned that right shall also sign and attest the application.

(c) One (1) copy of all documents required by the administrator shall **must** be submitted by the person applying to the fund to support the application. Original documents must be kept by the person applying to the fund for a minimum of four (4) years after the date the application for payment was submitted or four (4) years after completion of corrective action, whichever is later.

(d) Claims, other than final claims, that had costs disallowed, if resubmitted, must be resubmitted with subsequent claims. The portion of the claim that was previously submitted must be identified as being previously submitted and include the dollar value of the original claim. The same disallowed cost may only be submitted to the department for consideration three (3) times, including the initial claim submittal.

(e) A single claim application may not be submitted to the fund for reimbursement in an amount less than five thousand dollars (\$5,000) unless the claim is one (1) of the following:

- (1) The final application for that incident and the claim is identified as such.
- (2) A claim for costs incurred over ~~six (6) months~~ **one hundred eighty (180) days** from the date of the previous claim.
- (3) A claim made within fifteen (15) days of a ~~fund-qualifying occurrence~~ **an eligible release** being categorized to a lower category, with one (1) being the highest category, under [328 IAC 1-4](#).
- (4) ~~Zero dollars (\$0)/eligibility~~ **Eligibility** preapproval claims **requesting zero dollars (\$0)**.

(Underground Storage Tank Financial Assurance Board; [328 IAC 1-5-1](#); filed Dec 4, 1992, 11:00 a.m.: 16 IR 1056; filed Nov 1, 1995, 8:30 a.m.: 19 IR 349; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534; filed Oct 17, 2001, 4:30 p.m.: 25 IR 801; filed Aug 30, 2004, 9:40 a.m.: 28 IR 142; readopted filed Nov 19, 2010, 9:08 a.m.: [20101215-IR-328100553BFA](#); filed Feb 24, 2011, 2:04 p.m.: [20110323-IR-328080684FRA](#); readopted filed Jun 29, 2017, 9:30 a.m.: [20170726-IR-328170227BFA](#))

SECTION 23. [328 IAC 1-5-2](#) IS AMENDED TO READ AS FOLLOWS:

[328 IAC 1-5-2](#) Fund payment procedures

Authority: [IC 13-23](#)

Affected: [IC 13-23-8](#); [IC 13-23-9](#)

Sec. 2. (a) Contingent on the availability of monies as determined by [328 IAC 1-2-3](#), the administrator shall authorize payment upon determining that the requirements of [IC 13-23-9-2](#) [IC 13-23-8](#), [IC 13-23-9](#), and **this article** have been met. Payment ~~will be~~ **is** made as follows:

- (1) When a person applying to the fund submits an application under section 1 of this rule ~~which that~~ includes reimbursable costs for which that person has not made payment, then payment shall **must** be made ~~by check~~ jointly to the person applying to the fund and the contractor involved **using a payment method accepted by the department**.
- (2) When a person applying to the fund submits documentation verifying that the person has incurred reimbursable costs, payment shall **must** be made ~~by check~~ directly to that person **using a payment method accepted by the department**.

(b) A determination under this rule is appealable under [IC 13-23-9-4](#).

(c) Only ~~the owner, operator, or responsible~~ **an eligible** party may seek preapproval of eligibility to have reimbursable costs or ~~third-party liability~~ **ELTF indemnity** claims paid from the fund.

(Underground Storage Tank Financial Assurance Board; [328 IAC 1-5-2](#); filed Dec 4, 1992, 11:00 a.m.: 16 IR 1056; filed May 25, 1999, 4:31 p.m.: 22 IR 3103; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534; filed Oct 17, 2001, 4:30 p.m.: 25 IR 801; filed Aug 30, 2004, 9:40 a.m.: 28 IR 142; readopted filed Nov 19, 2010, 9:08 a.m.: [20101215-IR-328100553BFA](#); filed Feb 24, 2011, 2:04 p.m.: [20110323-IR-328080684FRA](#); readopted filed Jun 29, 2017, 9:30 a.m.: [20170726-IR-328170227BFA](#))

SECTION 24. [328 IAC 1-6-1](#) IS AMENDED TO READ AS FOLLOWS:

Rule 6. ELTF Indemnity Claims

[328 IAC 1-6-1](#) Applications for payment of ELTF indemnity claims

Authority: [IC 13-23](#)

Affected: [IC 13-23-9-1.3](#); [IC 13-23-9-3](#)

Sec. 1. (a) Applications for reimbursement of ~~third-party liability~~ **ELTF indemnity** claims against owners or operators ~~shall~~ **must** be submitted on approved forms established by the administrator. The applicant must attach either a certified copy of a legally enforceable final judgment against the owner or operator or a reasonable settlement between the owner or operator and the third party.

(b) The owner or operator must provide evidence of payment of costs incurred equal to the ~~applicable~~ deductible **and any additional** amount under ~~[IC 13-23-8-3](#)~~ [IC 13-23-9-1.3](#).

(c) When submitting an application to the administrator under subsection (a), the owner or operator must also forward a copy of the request to the attorney general.

(d) The minimum single claim amount contained in ~~[328 IAC 1-5-1\(d\)\(1\)](#)~~ [328 IAC 1-5-1\(e\)](#) does not apply to ~~third-party liability~~ **ELTF indemnity** claims.

(Underground Storage Tank Financial Assurance Board; [328 IAC 1-6-1](#); filed Dec 4, 1992, 11:00 a.m.: 16 IR 1057; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534; filed Oct 17, 2001, 4:30 p.m.: 25 IR 802; filed Aug 30, 2004, 9:40 a.m.: 28 IR 143; readopted filed Nov 19, 2010, 9:08 a.m.: [20101215-IR-328100553BFA](#); filed Feb 24, 2011, 2:04 p.m.: [20110323-IR-328080684FRA](#); readopted filed Jun 29, 2017, 9:30 a.m.: [20170726-IR-328170227BFA](#))

SECTION 25. [328 IAC 1-6-2](#) IS AMENDED TO READ AS FOLLOWS:

[328 IAC 1-6-2](#) Fund payment procedures for ELTF indemnity claims

Authority: [IC 13-23](#)

Affected: [IC 13-11-2-193.5](#); [IC 13-23-9-3](#)

Sec. 2. (a) If the attorney general ~~determines that the requirements under~~ **approves an ELTF indemnity claim in accordance with [IC 13-23-9-3](#)**, ~~have been met, the attorney general shall approve a request for payment of a third-party liability claim not later than sixty (60) days after receiving the request. the administrator shall thereafter pay the approved third-party liability~~ **ELTF indemnity** claim in accordance with this rule:

- (1) if sufficient monies exist after other obligations have been met under [328 IAC 1-2-3](#);
- (2) based upon the category of the ~~fund-qualifying occurrence~~ **eligible release** and ranking of the claim under [328 IAC 1-4](#), if applicable; and
- (3) if the administrator determines that the owner or operator is in compliance with the requirements of [IC 13-23](#) and rules adopted thereunder.

(b) When ~~a third-party liability~~ **an ELTF indemnity** claim is approved by the attorney general but the claim has not already been paid by the owner or operator, then payment ~~shall~~ **must** be made jointly ~~by check~~ to the eligible owner or operator and the third party **using a payment method accepted by the department**.

(c) When ~~a third-party liability~~ **an ELTF indemnity** claim is approved by the attorney general and the owner or operator submits to the administrator documentation verifying that the owner or operator has paid the ~~third-party liability~~ **ELTF indemnity** claim, payment ~~shall~~ **must** be made directly to the eligible owner or operator.

(d) ~~Third-party liability~~ **ELTF indemnity** claims subject to approval by the attorney general ~~shall~~ **must** include the reasonable fees or compensation paid for any of the following:

- (1) Access to properties not controlled by the applicant, if not submitted as a reimbursable cost under [328 IAC 1-3-5](#).
- (2) Institutional and engineered controls for off-site properties, including ~~but not limited to~~, restrictive covenants as defined under [IC 13-11-2-193.5](#).
- (3) Attorney's fees, not to exceed twenty-five percent (25%) of the total claim or thirty thousand dollars (\$30,000), whichever is less, ~~shall only be~~ **are only** payable if incurred by the owner or operator in defense of ~~a third-party liability~~ **an ELTF indemnity** claim.

(Underground Storage Tank Financial Assurance Board; [328 IAC 1-6-2](#); filed Dec 4, 1992, 11:00 a.m.: 16 IR 1057; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534; filed Oct 17, 2001, 4:30 p.m.: 25 IR 802; filed Aug 30, 2004, 9:40 a.m.: 28 IR 143; readopted filed Nov 19, 2010, 9:08 a.m.: [20101215-IR-328100553BFA](#); filed Feb 24, 2011, 2:04 p.m.: [20110323-IR-328080684FRA](#); readopted filed Jun 29, 2017, 9:30 a.m.: [20170726-IR-328170227BFA](#))

SECTION 26. [328 IAC 1-6-3](#) IS ADDED TO READ AS FOLLOWS:

[328 IAC 1-6-3](#) Components of ELTF indemnity claims

Authority: [IC 13-23](#)

Affected: [IC 13-23-9-3](#)

Sec. 3. (a) An ELTF indemnity claim may consist of monetary damages a tank owner or operator is legally obligated to pay for injury, costs, and damage suffered by a third party as the result of a release, including bodily injury and property damage.

(b) An ELTF indemnity claim may not include the following:

- (1) Punitive or exemplary damages.**
- (2) Claims for injury, costs, or damages arising on behalf or in favor of a person listed in [328 IAC 1-3-1](#).**
- (3) Costs that were previously determined ineligible for reimbursement.**

(Underground Storage Tank Financial Assurance Board; [328 IAC 1-6-3](#))

SECTION 27. [328 IAC 1-7-2](#) IS AMENDED TO READ AS FOLLOWS:

[328 IAC 1-7-2](#) Termination of financial assurance

Authority: [IC 13-23-11-7](#)

Affected: [IC 13-23](#)

Sec. 2. (a) After consultation with the financial assurance board, the administrator may determine that the fund does not provide ~~owners or operators~~ evidence of financial assurance **for owners and operators.**

(b) If a determination is made under subsection (a), the administrator shall notify all fund participants by certified mail.

(c) The fund coverage ~~will continue~~ **continues for sixty (60) days after ~~the~~ notice of insufficient funds to provide for financial assurance ~~owners or operators shall have~~ **is sent to the fund participants**.**

(d) Within thirty (30) days after receipt of the notice of insufficient funds, **to owners and operators shall:**

- (1)** acquire financial assurance as required under [329 IAC 9-8](#). ~~Owners and operators shall~~ [329 IAC 9](#); and
- (2)** provide proof of financial responsibility to the department.

(e) Invocation of prioritization under [328 IAC 1-4](#) does not constitute termination of financial assurance under this section.

(Underground Storage Tank Financial Assurance Board; [328 IAC 1-7-2](#); filed Dec 4, 1992, 11:00 a.m.: 16 IR 1057; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534; filed Oct 17, 2001, 4:30 p.m.: 25 IR 803; filed Aug 30, 2004, 9:40 a.m.: 28 IR 144; readopted filed May 14, 2007, 1:52 p.m.: [20070523-IR-328070137BFA](#); readopted filed Jul 29, 2013, 9:18 a.m.: [20130828-IR-328130177BFA](#))

SECTION 28. THE FOLLOWING ARE REPEALED: [328 IAC 1-1-2.2](#); [328 IAC 1-1-6](#); [328 IAC 1-1-6.5](#); [328 IAC 1-1-9](#); [328 IAC 1-1-10](#); [328 IAC 1-3-2](#); [328 IAC 1-3-4](#); [328 IAC 1-5-3](#); [328 IAC 1-7-1](#).

[Notice of Public Hearing](#)

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